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# REPORTS

OF



CASES ARGUED AND DECIDED

IN THE

## SUPREME COURT

2852 F

OF THE

STATE OF MISSOURI.

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BY B. F. STRINGFELLOW,

ATTORNEY GENERAL, AND, EX OFFICIO, REPORTER.  
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JUDGES OF THE SUPREME COURT OF THE STATE OF MISSOURI:

HON. WILLIAM B. NAPTON,  
HON. WILLIAM SCOTT,  
HON. PREISTLY H. McBRIDE.

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ATTORNEY GENERAL:

BENJAMIN F. STRINGFELLOW.

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# SUPREME COURT.

MARCH TERM, 1846.

LITTLE & NOECKER vs. NABB.

A guaranty of the payment of a note, need not shew upon its face, the consideration for which it was given.

APPEAL from St. Louis Court of Common Pleas.

PRIMM & TAYLOR, *for Appellants.*

## POINTS AND AUTHORITIES:

1. The instruction of the Court takes the whole case from the jury and leaves them nothing to do, but sign the same for their verdict, which they in fact did. 6 Mo. Rep. 64.

2. The instruction of the Court was erroneous, because the guarantee need not express the consideration, but the same may be shown by parol, which was done in this case. 2 Mo. Rep. 103; 8 Mo. Rep. 303.

3. The plaintiffs were entitled to a verdict, for they shewed more than the strict letter of the law required, as the makers of the note were proven to have been insolvent, not only at the time same was made, but so at the time the guarantee was executed, as well as the time this suit was brought.

4. It was not necessary that the note should have been protested, and notice given to the guarantor. 20 John. Rep. 364-5, and authorities there cited.

5. If the defendant relied on the statute of frauds, then the plaintiffs were entitled to a verdict, and the instruction was erroneous, because it has been repeatedly decided in our Courts that the memoranda need not express the consideration, but the same may be shown by parol. See authorities cited in point second.

6. The guarantor being the payee of the note, executing and delivering the same to the appellants, it imports a consideration in itself. 13 John. Rep. 175, and cases cited in note.

CROCKETT & BRIGGS, *for Appellee.*

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*Little & Noecker vs. Nabb.*

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NAPTON, J., *delivered the opinion of the Court.*

This was a suit originally brought before a Justice of the Peace, upon the following note and guaranty :

"St. Louis, 31st May, 1842. For value received, we and each of us, promise to pay to Geo. W. Nabb, or order, twenty dollars, negotiable and payable without defalcation.

NEWT. WEIMAR,  
THOMAS DICK."

The following endorsement was on the note: "To Messrs. Little & Noecker: I hereby guarantee and secure the payment of the within note, this 13th Aug., 1842.

GEORGE W. NABB."

On the trial before the Court of Common Pleas, the plaintiff gave in evidence the note above set forth, and the endorsement thereon; proved the handwriting of defendant, and the consideration for which the note and guarantee were given, and further proved that said Weimar & Dick were both insolvent at the time said guarantee was executed. The defendant objected to the plaintiffs recovery because the guaranty did not express on its face the consideration for which it was given, and thereupon the Court instructed the jury to find a verdict for the defendant, which the jury accordingly did. An unsuccessful motion was made for a new trial, and the cause is brought here.

This Court has heretofore had occasion to give an opinion in relation to instructions such as the present. In accordance with the doctrines heretofore settled, this judgment must be reversed. Moreover, the doctrine of *Wain vs. Walters* has not been adopted in this State. *Oden, &c., vs. Valle*, 2 M. R. 103.

Judgment reversed and cause remanded.

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WM. WEBBER vs. THE STATE OF MISSOURI.

An indictment for a libel upon George Morton, charged the defendant with publishing in the German language that which in English conveyed the charge that "Morton was the most swindling and worthless speculator who ever brought ruin upon the city of St. Louis." On the plea of "not guilty," the jury found a special verdict—"we the jury find the defendant guilty of charging Mr. Morton of being a visionary worthless speculator."

Held,—

1. That the matter on which the defendant was found guilty, is not that with which he was charged.
2. The verdict is defective, in not finding any malice in defendant.

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Wm. Webber vs. The State.

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### APPEAL from St. Louis Criminal Court.

FIELD & KRIBBEN for Appellant, insist:

I. The special verdict was insufficient to warrant a judgment of conviction:—

1. Because it found no offence at all as charged in the indictment. It found the defendant guilty of "*charging* Morton," &c. The term *charging*, by no construction admissible in criminal proceedings, can be regarded as the equivalent of "*writing and publishing*," which are the words of the indictment.

2. It found no libel on George Morton as charged in the indictment. In the language of the special verdict, the libel, if any, was concerning *Mr. Morton*. But the Court cannot know that the George Morton of the indictment, is the Mr. Morton of the verdict.

3. Because the verdict does not find the offence of which it speaks, to have been committed in St. Louis county.

4. Because the verdict finds no time when the offence was committed. It might have been more than a year before indictment found.

5. Because the verdict finds no malice or falsehood in the defendant's charge, both of which are essential ingredients in every libel.

6. Because the words found in the verdict are different in sense and meaning from those set out in the indictment.

7. Because the verdict finds no libel in the German language, and herein departs from the charge in the indictment.

The counsel for the appellant, in support of the foregoing, cites the following authorities: 5 Bac. Abr. 32, title Verdict; King vs. Francis, 2 Strange 1015; Scharf vs. Com., 2 Binney 514; Com. vs. Call, 21 Pick. 509; Dyer vs. Com., 23 Pick. 402; Jenks vs. Hallett, 1 Caine's Rep. 60; 2 Hawk. 627; King vs. Hazel, 1 Leach 406.

II. The defendant insists that the verdict is equivalent to an acquittal, and that he is entitled to his discharge. The rule, as it is extracted from the cases, is conceived to be, that where the special verdict substantially finds an offence included in the indictment, but omits some circumstance necessary to warrant a judgment, or where the judgment is so imperfect that the meaning of the jury cannot be collected from it, the Court will award a *venire de novo*; but where the matter found is in substance no offence at all, or not an offence contained in the indictment, the defendant will be discharged. Defendant insists:

1. That the words found in the verdict are not libellous.

2. That if libellous, they differ from those charged in the indictment, and therefore could never warrant a judgment of conviction under the indictment.

In many cases a much more liberal rule towards the defendant has been adopted, as will be seen by reference to the cases cited above. And in *Worley vs. Isabel*, 1 Bibb 250, it is said that in criminal cases a special verdict must be taken as an acquittal of all that is not particularly found in it. See the remarks on *Rex vs. Woodfall*, in this last mentioned case.

SCOTT, J., delivered the opinion of the Court.

Webber was indicted for a libel on George Morton, published in the German language, which, in English, conveyed the charge that Morton was the most swindling and worthless speculator who ever brought ruin upon the city of St. Louis. On not guilty, pleaded, the jury found the

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*Walsh vs. Homer.*

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following verdict: "We the jury find the defendant guilty of charging Mr. Morton of being a visionary, worthless speculator." A motion was made in arrest of judgment, which was overruled by the Court, and judgment was entered imposing a fine of one dollar, and imprisoning the accused one hour.

The only question raised on the record is as to the sufficiency of the verdict. This is not like those cases in which it has been held that a person indicted for one offence may be found guilty of a lower grade of the same offence; as where one is indicted for murder, he may under the same indictment be found guilty of manslaughter. So, one indicted for robbing, may be found guilty of stealing simply. No malice is found by the jury in their verdict, which is of the very essence of the offence of libelling. They have found the accused guilty of a matter different from that with which he is charged in the indictment, and it is hard to say on what principle the verdict can be sustained. *Rex vs. Woodfall*, 5 Bur.; *Scharff vs. Comm.*, 5 Binney; *The People vs. Olcott*, 2 J. C. 311; *McNally's case*, 9 Coke 111.

Judge NAPTON concurring, the judgment will be reversed.

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WALSH vs. HOMER.

1. It is no deviation, so as to make the owners liable for a loss for a steamboat to stop on her voyage to aid another boat in distress, even though there may be no danger of any loss of life.
2. Evidence that it is usual and customary for one boat on a voyage, to stop and aid another boat in distress, is competent to shew that such is not a deviation.
3. In an action against the owners of a boat for a loss occasioned by the sinking of the boat, after a deviation, it is not necessary to prove that the deviation caused the loss. It is sufficient to shew the deviation, and subsequent loss.
4. What constitutes a deviation depends upon the nature of the voyage, and the usage of the trade.

*Settle & Bacon vs. Perpetual Ins. Co.* 7 Mo. Rep. 379, in part overruled.

## APPEAL from St. Louis Circuit Court.

GAMBLE & BATES for *Appellants*, insist:

1. The admission of the testimony objected to by the defendant below, was wrong.

It was wholly based upon entries made in books, and bills and memoranda made by others. And no evidence of the character of the documents, and the persons who made them, was produced nor accounted for,—and in one deposition (Faulkner's) he speaks of marks upon packages without any means of knowledge whatever.

See 1 Phil. Ev. 263-4-5.—1 Greenleaf Ev. section 117, &c., and more particularly sections 50, 51, page 61—and as to *onus probandi*, ib. p. 89, §74, &c.

2. The plaintiff could not recover on either of the first three counts of his declaration, without proving that the loss of the Rolla, (and consequent loss of the goods,) was occasioned by the stopping to aid the Collier. And if this be so, it follows that the Court erred in refusing the defendant's first four instructions.

3. The relation between the plaintiff and the defendant, arising from the contract of affreightment, and the relation between the plaintiff and the Insurance Company, arising from the contract of insurance, are separate and distinct—they have no relation with, or bearing upon each other, and present subjects of entirely disconnected causes of action.

4. The plaintiff has not sued to recover damages for the destruction or avoidance of the policy of insurance, as a *substantive independent cause of action*: and surely he cannot recover for the avoidance of the policy as consequential on, or in aggravation of, the loss of the goods.

5. If we disregard all that appears in the record about insurance, *then* the record shews a plain case for the defendants, on the plaintiff's contract with them, as *carriers*.

6. The giving of the instructions asked by the plaintiff, and the refusal of the 5th instruction asked by the defendant, was wrong, because—

1st. The stopping of the Rolla to aid the Collier in distress was not a deviation.

2nd. If in its nature it were a deviation, still it was justified by usage, and so did not avoid the policy; and still less did it charge the defendants as carriers, having no concern in the policy.

3rd. If it were a deviation, and did avoid the policy, still the plaintiff had no right on *that account*, to recover the value of the goods in this action.

7. A new trial ought to have been granted because wrong instructions were given, and right instructions refused, and improper testimony admitted.

GEYER & SPALDING for *Appellee*, insist:

1. The detention and employment of the Rolla, in the attempt to relieve the Collier, by removing cargo therefrom, (there being no life in danger,) was a deviation that discharged the underwriters on the cargo of the Rolla from liability for subsequent loss. *Settle & Bacon vs The Perpetual Insurance Company*, 7 Mo. Rep. 379.—1 Phil. on Ins. 485. *Williams vs. Box of Bullion*, 6th Law Reports 363.—1 Phil. on Ins. 513, 530-1.

2. The usage or custom attempted to be established at the trial does not change the rights of the parties. It could not and did not operate to charge the insurers in *Settle & Bacon vs. Perpetual Insurance Co.* where it was specially pleaded, and cannot discharge the carriers. *Collins vs. Hope*—3rd Wash. Cir. C. R. *The Reeside*, 2nd Sumner 569. *Macomber vs. Parker*, 13 Pick.



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182. Sampson vs. Gazzan, 6 Porter 123. Winthrop vs. Union Ins. Co. 2nd Wash. C. C. R. 7. Rankins's Amer. Ins. Co. 1 Hall, 619, 2nd Barrows 1216. Renner vs. Bank of Columbia, 9 Wheaton, 591. The usage of no class of men can be sustained in opposition to established principles of law. 10 Mass. 29—2 Johns R. 335—2d Wash. C. C. R., 7, 24.—1 Hall, 602, 619.—6 Pick, 131—7 Mo. R. 379.

3. The change made by the Insurance Offices in their form of Policy on cargo, after the decision of the case of Settle & Bacon vs. Perpetual Ins. Co., cannot aid the appellants, neither as a recognition of the usage relied on, nor as a justification of a deviation in a previous voyage. The insurers which were themselves discharged by reason of the deviation could not if they would, transfer the loss from the carriers to the insured. They have, however, not presumed so far as to modify pre-existing contracts, nor ventured in any degree to change the law of insurance. The clause referred to itself proceeds upon the assumption that the underwriters are discharged and the carriers rendered liable by the deviation—and proposes nothing more than to take upon the insurers the trouble and expense of prosecuting the carriers.

4. The underwriters being discharged by the act of the Master, without the assent of the insured, the owners are rendered liable for the loss—as common carriers. Owners of steamboats carrying freight for hire are common carriers, and subject to their liabilities. Allens vs. Sewell, 2 Wend. 327. Bank of Orange vs. Brown, 3 Wend. 158. Steamboat Co. vs. Bason Harper, 262. Story on bailments, 322, §495. They are liable for every injury happening to property entrusted to their care, unless it be caused by inevitable accident, by public enemies, or by the act of the owner of the property. Cott vs. McMahan, 6 Johns. 160. Kemp vs. Caughty, 11 Johns. 107.

5. It is part of the contract of the carrier by water to pursue the voyage in the most direct and safe course, and in the most expeditious manner as far as consistent with safety. If he deviates, underwriters are discharged from, and the carriers liable for, subsequent loss, even from inevitable casualty; for under such circumstances the loss is traced back through all the intermediate causes to the first departure from duty. Story on Bailment, §509. Cropley vs. Ketch, 12 C. R. 410. Davis vs. Garrett, 6. Bingham, 716.—1 Phil. Ins. 485-6. 21 Wendell, 190.—1 Smith's leading cases, 178, 182. Lawrence vs. McGregor, Wright, 193.

6. The owner of a vessel is liable for all acts or omissions of the Master whereby a loss happens to the shipper. 1 Wash. C. C. 17. And in every case of loss the burthen of proof is on the carrier to shew that no care could have prevented the loss. Murphy vs. Staton, 3 Monford, 239. Bell vs. Reed, 4th Binny, 127. Turney vs. Wilson, 7th Yerger, 340. In this case the deviation occasioned a loss to the shipper in discharging his Policy, upon which, but for the deviation, he might have recovered, and the loss so occasioned was the consequence of the act of the Master of the Rolla.

7. Even if the goods had not been insured, it would not have been necessary for the plaintiff to prove that the loss was actually occasioned by the deviation as asserted by the defendants in the refused instructions, because in such case the loss is traced back through all intermediate causes to first departure from duty. Story on Bailment, §509. A deviation is in effect a substitution of another voyage for that contracted for—1 Douglass, 291. 4 Mass. 338. In a case, therefore, of a loss of goods not insured, the shipper suing the carrier, though he must aver the loss to have been occasioned by the deviation—sufficiently supports that averment by proof of deviation and subsequent loss, the law imputing the loss to the deviation: and the most that the carrier can claim in such case, is, that he may repel this *prima facie* case by proof that the deviation did not, and could not in any wise have contributed to the loss.

8. In this case, it was not necessary for the plaintiff to aver or prove that the loss of the goods was directly occasioned by the deviation, or that the misconduct of the Master is in any wise connected with the subsequent loss. The action is brought by the shippers to recover for the injury they have sustained in the discharge of their Policy by the act of the Master. And the actual loss or destruction of the goods is no otherwise material, than as it shews with other facts, that but for the deviation the shippers might and would have been indemnified by the insurers.

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The gist of this action then is, the loss of remedy on the Policy by the act of the Master, and all that it was necessary for the plaintiffs to aver, and prove, was the insurance and shipment of the goods, the deviation and subsequent loss by a peril insured against. All this is distinctly averred, and conclusively proved at the trial.

9. There is no averment in the declaration that the loss of the goods was actually occasioned by the deviation, as contended by the defendants. The allegation is, that by reason of the deviation the Rolla was exposed to storms and other perils, and then and there was run and driven upon a snag, &c., by means whereof the goods were wetted, &c. The loss is here stated to have been after, not that it was occasioned by the deviation. The loss is imputed to the snagging and sinking of the vessel: and all that is imputed to the deviation is the exposure to storms, &c., (the conclusion of law from the facts stated,) and the discharge of the underwriters, also a conclusion of law.

10. Even if it be assumed that the first three counts do charge the loss of the goods to the deviation, it was not necessary to connect the loss with the deviation as supposed by the refused instructions. Because, first, the averment is supported by proof of the deviation, and subsequent loss. Story on Bailment, §509. *Davis vs. Garret*, 6 Bing. 716. And, second, the averment is immaterial, and need not be proved: the gist of the action being the loss of the remedy on the Policy, all that was necessary to aver or prove, was, the insurance and shipment of the goods, a deviation, and subsequent loss under such circumstances, that but for the deviation the insured would have been entitled to indemnity from the underwriters: (see authorities above cited.) All other averments, and especially that referred to, may be regarded as immaterial, and not necessary to be proved. *Leslie vs. Wilson*, 3 Brod & Bing. 171. (E. C. L. R. 7, p. 395.) *Bramfield vs. Jones*, (E. C. L. R. 10, 362.) (4 B. & C. 380.) *Wilson vs. Cadman's Ex'r*. 3 Cranch 193. *Williams vs. Allison*, 2 East. 446.

11. The evidence objected to at the trial was competent, and therefore properly admitted. That it was not in itself sufficient to prove all the facts necessary to establish the shipment of the goods may be true, but that is an objection to sufficiency, not competency. If after all the testimony of the plaintiff was concluded, it was desired to test the sufficiency of the evidence, or any one fact, it was the duty of the defendants to move appropriate instructions, as was in fact done in reference to the testimony of one witness (Walcott) in the second instruction given at their prayer: and their first instruction covers all cases of insufficiency touching shipments.

*SCOTT, J., delivered the opinion of the Court.*

This was an action on the case brought in the St. Louis Circuit Court by the appellee as surviving partner of the firm of J. & T. J. Homer, against the appellants, as owners of the steamboat Rolla, to recover for the loss of certain goods shipped on board that boat at New Orleans. The verdict and judgment were in favor of the plaintiffs below, and the cause is brought into this Court by appeal.

The first count of the declaration sets forth a Policy of insurance on goods of the plaintiff made by the St. Louis Perpetual Insurance Company, and alleged that goods covered by the policy were shipped on board the Rolla, of which the defendants were the owners, at New Orleans, to be transported to St. Louis. That during the voyage, the Master of the Rolla deviated, &c., and detained and employed the boat with



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the goods of the plaintiff on board, in relieving the steamboat *George Collier*, which was aground in the Mississippi, and in transporting goods from the *Collier* to the shore no life being in danger. And that although the *Rolla* did after such detention, &c., proceed in the voyage with the goods on board, yet the said steamboat *Rolla*, with the said goods and merchandize, by reason of the said defendants, their servants and agents in that behalf, not proceeding therewith from New Orleans aforesaid to St. Louis aforesaid, as soon as they were reasonably able, by and according to the direct, usual, and customary way and passage, but on the contrary thereof, deviating, departing, touching or remaining, continuing and being delayed, as in that behalf aforesaid, and before her arrival at St. Louis aforesaid, at the county aforesaid, was exposed to, and assailed by storms, and other perils, in the river Mississippi, near a certain island called Island No. 21, and then and there was run and driven on a snag, or other hard substance, and was wrecked, shattered, and broken, by means whereof the same goods, &c., of plaintiff, on board said boat, were wetted, damaged, spoiled and sunk, and wholly lost to the plaintiff, and by reason of the said deviation, departure, detention and stoppage of the said steamboat *Rolla*, with the said goods, &c., on board, by the defendants, their servants and agents, as in that behalf aforesaid, the said insurers in the said Policy of insurance mentioned, became and were discharged from all liability for, or on account of, the said damage and loss, or any part thereof.

The second and third counts are in substance the same as the first. The fourth count is in the ordinary form against carriers for the loss of goods, averring that the defendants did not safely and securely carry and deliver the goods according to their undertaking, but on the contrary so improperly behaved and conducted themselves with respect to said goods, that by and through the mere negligence, misconduct, and default of the defendants, their servants and agents, the goods were lost.

The defendants pleaded not guilty. At the trial, the plaintiff gave in evidence the Policy of insurance, and the endorsements thereon, and offered evidence conducing to prove the shipment of goods, covered by that Policy, on board the *Rolla*, at the time and for the voyage mentioned. Parts of the evidence on this point were objected to, but the objections were overruled. That George Taylor was the Master, and the defendants owners of the boat, that on the progress of the voyage the *Rolla* was detained and employed in relieving the *Collier*, then aground, by transporting goods from that vessel to the shore, and in at-

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tempting to pull her off the bar by the power of the Rolla. That the Rolla afterwards proceeded on the voyage, and was wrecked, as alleged, and the goods of the plaintiff lost.

Witnesses testified that from the commencement of steam navigation on the western waters, it had been the uniform usage and custom of all boats when meeting another boat aground, to afford any assistance in their power, and although it was the uniform practice to charge for such service, yet no stipulation for such compensation was made before furnishing the aid required. This usage was generally known to merchants and insurers.

It was proved that after the opinion of this Court in the case of *Settle & Bacon vs. The St. Louis Perpetual Insurance Company*, 7 Mo. Rep., 379, the different insurance companies at St. Louis inserted in their Policies, a clause to the effect that in case of loss after deviation to give succor to a vessel in distress, the loss should be paid notwithstanding the deviation, "upon the assured assigning to the Company all claims he or they may have against the owners of such steamboat in consequence of such deviation, and authorizing the Company to use his name to enforce such claim for the benefit of the Company."

The plaintiff moved the Court to give to the jury the following instructions, which were given, to which the defendant excepted, viz :

"If the jury find that goods of the plaintiff covered by the Policy in the declaration mentioned were shipped on board the steamboat Rolla at New Orleans, to be carried to the port of St. Louis, that said boat departed from New Orleans on said voyage with the said goods on board, and that during the voyage said steamboat Rolla, with said goods on board, was stopped and detained without the consent of the plaintiff, for the purpose of assisting the steamboat *George Collier*, then aground in the Mississippi river, and that the Rolla was there used and employed in transporting cargo from the *Collier* to the shore, and in attempting to draw the said *Collier* into deeper water, such detention and employment was a deviation, which discharged the underwriters from any subsequent loss of said goods on board the Rolla, during that voyage.

"If the jury find from the evidence, that goods of the plaintiff covered by the Policy in the declaration mentioned, were shipped on board the steamboat Rolla at New Orleans, to be carried to St. Louis, that said goods during the voyage were lost by a peril insured against, and that the underwriters were discharged from liability for such loss, by reason of the previous deviation of said boat by the voluntary act of the Master, then the owners of the Rolla are liable for such loss."

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The defendant then asked the following instructions, which were refused, to which an exception was taken, viz :

"That the jury must find for the defendants on the three first counts in the declaration, unless they find from the evidence that the loss of the goods and merchandize in those counts mentioned, was actually occasioned by the alleged deviation from the usual course of the voyage in said counts mentioned respectively.

"The plaintiff cannot recover on the first count in his declaration for the loss of the goods therein mentioned, unless it appears to the satisfaction of the jury from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That the plaintiff cannot recover on the second count of his declaration for the loss of the goods therein mentioned unless it appears to the satisfaction of the jury from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That the plaintiff cannot recover on the third count of his declaration for the loss of the goods therein mentioned, unless it appears to the satisfaction of the jury from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That if the jury find from the evidence that, at the time of the loss of the Rolla, there was, and for many years previous had been, a custom, and usage, in the navigation of the Mississippi river, for steamboats navigating said river to stop in their voyages, and furnish assistance to other steamboats aground in said river, and in distress, and that such custom and usage was general, and generally known to merchants, owners of boats and insurers concerned in the navigation of said river, and that the captain and crew of the steamboat Rolla, in the alleged deviation to succor the steamboat George Collier, aground in the Mississippi river, did no act, and suffered no detention of said steamboat Rolla, beyond or out of the said custom and usage, then the defendants are not responsible for any act of the said captain, or crew, which is within said custom or usage."

The principal question in this cause was before this Court in the case of Settle and Bacon vs. The St. Louis Perpetual Insurance Company, 7 Mo. Rep., 379. In that suit, the Policy of insurance was executed by the same company, the shipment was for the same voyage, on the same vessel, and the loss by the same disaster as is alleged by the declaration

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in this case. In the above mentioned cause the point most debated was whether the detention of a vessel in the navigation of the Mississippi for the purpose of succoring another vessel in distress, when no life was in danger, was a deviation or not. Except in the case mentioned, it does not appear that this question has come up for adjudication. Eminent Judges, and elementary writers, influenced by the benevolence and humanity of our law, have not hesitated to declare that a detention on a voyage at sea to relieve a vessel in distress, is not an act which would discharge the underwriters to a Policy of insurance, from the liability to the assured, in the event of a loss of the vessel affording the succor. Some have said that a deviation to save life or to succor persons in distress was allowable, but that a deviation for the purpose of saving property would discharge the underwriters. On our rivers, boats may be in danger when the lives of the crew and passengers are entirely safe, but in ocean navigation a vessel can scarcely be in distress, unless the lives of those on board are at the same time endangered. Hence the language of the books, that a detention to succor a vessel in distress is not a deviation that would discharge the underwriters. Judge Sprague, who maintained the doctrine that a stoppage to succor vessels in distress is not a deviation which would discharge a Policy, yet holds, that under the pretence of succoring distress, it was not allowable to become wreckers at the risk of the insurer. So Judge Washington, 2 Wash. C. C. Rep. 84, says: "the general definition of deviation, is, a voluntary departure from the course of the voyage insured, without necessity or reasonable cause, and I recollect no case where the justification is not essentially connected with the motive of safety to the property insured. If the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the general rule."

In the case of *Settle & Bacon vs. The St. Louis Perpetual Insurance Company*, it was admitted that no life was in danger, and of the two questions in that case, whether a detention to relieve vessels in distress, when no life was in danger, would discharge a Policy; and, whether there was a usage in the inland navigation of our rivers, which would justify a deviation for such a purpose; the first was most elaborately argued at the bar, and it did appear that it was the turning point of the cause. I am not prepared to say that the conclusion to which this Court arrived on the former of these questions, was erroneous.

In adopting the form of the Policies used in Marine Insurances, it

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must have been understood that they should receive their long accustomed interpretation. No case, I imagine, can be found in the law of Marine Insurance in which it was held that a deviation to assist a vessel as little exposed as the *Collier*, was a justifiable deviation. Contracts of insurance are said to be *uberrimæ fidei*. The vessel and cargo are in the possession and under the control of persons who, relying on the Policy for an indemnity against losses, are stimulated to acts which the dictates of self-interest would effectually restrain, while those who are mostly interested in their preservation, and are liable to make good any losses that may occur, are at a great distance. Any latitude of discretion allowed to Masters of vessels under such circumstances, would lead to the grossest frauds on underwriters. The reasons which govern in moulding the law in relation to the responsibility of common carriers, lie at the foundation of the rule prescribing the duties of the Masters of vessels in respect to those who have made themselves responsible for their loss by insurance. The law fixing the responsibility of common carriers, is, as Lord Holt observes, "a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealing with them, by combining with thieves, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered, and this is the reason the law is founded upon, in that point." The law requires that a voyage should be performed with all practicable, safe, and convenient expedition. The impossibility in many cases of determining whether a subsequent loss has been caused by a previous detention, is the reason that vessels insured are not permitted at the risk of the insurer to stop on their voyages, unless in cases of necessity. A very short detention may be the cause of the loss of a vessel, and yet the keenest attention will not be able to detect and expose the train of incidents which connect the two events. Hence it has always been settled that a departure from the usual course of a voyage, or a detention during it without necessity, or justifiable cause, was an act which would discharge the underwriters in the event of a subsequent loss. By the terms of the contract, the insurer only runs the risk of the voyage agreed upon, and of no other. It is a condition implied in the Policy, that the ship shall proceed to her port of destination by the shortest and safest course, and with all practicable, safe, and convenient expedition; and if the assured deviated or stopped



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on the voyage without necessity or a justifiable cause, it is a breach of the implied warranty, the effect of which is to discharge the underwriters from all subsequent responsibility, not because the risk is thereby increased, but because the insured had, without necessity, substituted another voyage for that which was insured, and thereby varied it. By the contract, the voyage is to be performed with all practicable speed. After a detention, the vessel at any time during her subsequent voyage is at a different place from that at which she would have been had it not been for the detention. Had she been at the place where a speedy voyage would have taken her, the combination of circumstances which occasioned the loss might not have taken place. The agency this circumstance had in producing the event may be unknown, and as the Master cannot show that it had none, there is no hardship in making him suffer the consequence, as his unjustifiable act may have been the cause of it.

The foregoing principles are applicable to insurances on voyages exempt from the control of any custom or usage; but the courts all concur in the opinion that when the insurance is described to be on a particular voyage, the meaning of this description as well as the language used by the parties in other parts of the Policy, must be ascertained by its general acceptance and the *common usage*. The meaning of the parties is to be presumed to be, that the voyage is to be pursued in the most direct and safe course, and the adventure conducted in general in the most expeditious manner, as far as is consistent with safety, and if there be any departure from such course, or mode of conducting the adventure whereby the risks insured against are varied or increased, it behoves the assured to justify such departure by showing a *usage* in that respect, or a reasonable necessity for it. Phil. on Ins. 1, 480. Chancellor Kent remarks, that one cause of litigation in the courts on the subject of deviation is as to the facts and circumstances which will be sufficient to justify it, on the ground of usage or necessity. 3 Com. 312. Where there is a known usage, as to the course, or touching at particular ports, or any thing else in the conduct of the voyage, the parties are supposed to be acquainted with such usage, and have it in view when they enter into the contract. 1 Phil. on Ins. 489. In the case of *Noble vs. Kennoway*, Doug. 513, Lord Mansfield said "every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year."

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The Supreme Court of the United States, in the *Columbia Insurance Company against Catlett*, 12 Whea. 386-7, says, that the true meaning of a Policy is to be sought in an exposition of the words with reference to the known course and usage of the trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. Without question, any unreasonable delay in the ordinary progress of the voyage, avoids the Policy on this account. *But what delay will constitute such a deviation, depends upon the nature of the voyage and the usage of the trade.* In the case of *Clark vs. The United Marine and Fire Insurance Company*, 7 Mass. Rep., 365, Judge Sewall says—"that questions are continually arising on the operation and practical construction of Policies of insurance, a species of contract liable to a variety of incidents, and to be enforced in a great number of cases distinguishable from each other in the principles applicable to the decision. For rules to govern in these enquiries, there is more than ordinary reference to established usages, and these when ascertained and found to be suitable applications of general principles, or not inconsistent with them, or with the tenor of the contract to be explained and enforced, are considered as authoritative upon the parties. A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed, indeed, in the construction of contracts generally, where the conclusion is not avoided by special circumstances or stipulations." In the case of *Gordon & Walker vs. Little*, 8 Serg. & Rawle, 562. Judge Gibson, who denied that evidence of usage or custom fixing the construction of the words in a bill of lading is admissible, fully recognizes the relaxation of the common law rules of evidence in the case of a Policy, and admits that the usage of every particular trade necessarily enters into every Policy, and is resorted to for the purpose of explaining, and even controlling, those parts of the instrument that are merely formal.

These instances are sufficient to show that the construction of contracts of insurance are peculiarly influenced by usage. That evidence of usage is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom, and that the custom then becomes a part of the contract, and may be considered as the law of it. Policies in the same terms, will receive different interpretations as applied to different voyages. There is nothing in the usage relied on in this case as a justification for the detention, which would condemn it on the score of im-

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policy. As the services are always rendered for a remuneration, not much can be said in behalf of the humanity of the usage. That can only be vindicated by a gratuitous service, and making those rendering the assistance their own insurers. It is admitted that the usage relied on as a justification for the detention to succor vessels in distress, is coeval with steamboat navigation on Mississippi river. It must be presumed to have been known to all those who in any way have been affected by it. Contracts of insurance must be supposed to have been made with an eye to its existence. Is not the long existence of the usage some evidence of its policy? Had it been found contrary to the public good, would not the keen and steady sense of their interests have induced commercial men to demand its abolition, or to have guarded against it by stipulations in their contracts? This has not been done. The practice still continues, and we must presume that the master, the shipper and the insurer, all find advantages in maintaining and supporting it. The boat that renders assistance to-day may in her turn want it to-morrow. A boat of comparatively little value may be destroyed to-day, which the day before had been detained in saving from destruction one worth thousands, and both may have been insured by the same underwriters. Experience must have shown that in such adventures, a reciprocity of kind offices promotes upon the whole the interests of every one concerned in them. The abuse of this usage in our inland navigation to the prejudice of underwriters, cannot be carried to the excess to which it might extend in the navigation of the ocean. The facility of obtaining witnesses to a breach of duty by the Master, would tend greatly to check all approaches to misconduct on his part.

I am free to confess that the change in the form of the Policy of insurance which was made by the insurance companies in St. Louis after the decision in the case of *Settle & Bacon vs. The Perpetual Insurance Company*, has had its influence on my mind in the determination of this cause. If the law was declared in that case as it had previously been understood, why make the change? That change shows that the defence set up by the company in the above mentioned case was unjust. That the understanding of the parties was that a detention to save vessels in distress was justifiable. I had my doubts how far the usage set up should operate in the construction of the contract; but now that the solemn admission is made of record that the usage was in fact, and not merely in the eye of the law, in the contemplation of the parties at the time of entering into the contract, and as there is nothing in that usage contrary to the policy of the law, I can see no ground for withholding



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from it its full effect. The peculiar phraseology adopted in making the alteration in the contract of insurance, cannot disguise its real object. I am glad it is yet in the power of the court to correct the irregularity of the former decision. Pride of consistency shall never induce me to persist in error.

A point was made by the appellant that as the declaration avers that the loss of the Rolla was occasioned by a detention to succor the George Collier, the plaintiff was bound to prove it; and as there was no evidence that the loss was occasioned by such means, he has no right of recovery. An examination of the declaration does not satisfy me that it is averred that the loss was caused by succoring the George Collier. If a loss succeeds a deviation, it is not necessary to show that the loss was occasioned by it. All that is required in order to discharge the underwriters, or to subject the Master to damages, is evidence that the loss was posterior to the deviation. But even if there had been such an allegation, this case is different from those of *Breston vs. Wright*. Doug. and the steamboat *Little Red vs. Ward et. al.*, 7 Mo. Rep. In the former of these cases it was held, that when it was necessary merely to state a contract without setting forth its terms, yet if they were unnecessarily stated, they must be proved as laid. In the latter the principle was maintained, that when some of the terms of a contract were stated, and others omitted, those omitted could not be shown in evidence in order to create a variance. But this is not a question arising on the proof of a contract; it grows out of a declaration in *tort*, and the general rule of pleading in such cases is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided, that what is proved affords a ground for maintaining the action supposing it to have been correctly stated as proved. The only exception to this rule is when the allegation contains matter of description. If the variance be in respect of a matter not essential to maintain the action, it is of no importance. 1 Phil. Evi. 205. In an indictment for murder, if the death is alleged to have been caused by a blow with a sword, it is not necessary to show that it was actually done with a sword, but if it proves to have arisen from a staff, an axe or a hatchet, this difference is immaterial. So in an action against a sheriff where the plaintiff declared that he had J. S. and his wife in execution, and the defendant suffered them to escape, and a special verdict was found that the husband alone was taken in execution, (the execution being for a debt due from the wife before coverture,) and that he escaped, the court held that the substance of the issue was found, and gave judgment for the plaintiff. *Roberts and wife vs.*

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Herbert, 1 Sid. 5. So in *Broomfield vs. Jones*, 10 Eng. Com. Law Rep. 362, in an action of escape, the declaration alleged that the debtor was committed under a judgment on a *scire facias*, and on the trial it turned out, that the commitment was under the original judgment; it was held that the allegation of the judgment in *scire facias* was immaterial, and that it need not be proved. In the case under consideration enough was proved to maintain the action, a deviation and a subsequent loss; whether the loss was caused by the deviation or not was wholly immaterial.

Judge NAPTON concurring, the judgment will be reversed.

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 WALES & OTHERS vs. NELSON.
 

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Wales and others gave a bond to indemnify Nelson against all claims against the firm of Wales, Nelson & Wales. Suit was afterwards brought against the firm, and judgment rendered against them. The other defendants, Nelson not joining, filed a motion and had the judgment set aside. Execution having been issued, the amount was paid by Nelson—In an action brought by him on the indemnifying bond, and setting out this judgment, execution and its payment—

Held—

1. That under the plea of *nul tiel record*, defendant was entitled to shew by the record of the proceedings subsequent to the judgment, that the judgment had been set aside.
2. That Nelson could not recover for money paid by him under that judgment—it not being properly a “molestation” within the meaning of the bond. He could only recover for money lawfully collected from him.

### APPEAL from St. Louis Circuit Court.

*SHEPLEY for Appellant, written argument filed.*

*SPALDING for Appellee, insists:*

1. The defendants instruction was properly refused. It asked the court to say that there could be no recovery on the second breach, because the judgment in that breach mention had been reversed by a subsequent judgment, &c.

1. The instruction is confused; it speaks of the judgments being reversed or annulled by a subsequent judgment, which is not the fact; for the last judgment in the case did not effect the former, which had previously been settled.

2. There could be a recovery on the second breach, because that breach sets forth a molestat-

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tion of Nelson, by reason of a liability of the firm of Wales, Nelson & Co., and a compulsory payment of money to him.

3. The judgment was rendered against them all, notwithstanding defence was made, and Dexter T. Wales who was co-defendant with Nelson in that suit, and was bound by the bond to keep Nelson harmless, failed to do so, so that the bond was forfeited by that molestation, and Dexter T. Wales is estopped from denying the molestation.

4. In that suit the claim sued on was proved to be a liability of the firm of Wales, Nelson & co. against all the members of that firm, and the money was forced from Nelson in consequence of it. Why did not Dexter T. Wales prove payment if it had been paid in the six months?

5. The defendants proved by their own witness Morris Collins, that the debt was a liability of said firm, and there was not a particle of proof that it had ever been paid.

6. The subsequent *non suit* in the case, after the money had been collected on execution, raises no presumption that the debt had been paid within six months, which alone could have prevented a forfeiture.

7. Said subsequent proceedings were improperly admitted in evidence.

II. No exception was taken to the giving of the plaintiff's instruction, therefore no advantage can now be taken of it if wrong. 8 Mo. Rep. 234. Bompert vs. Boyer, 4 Mo. Reps. 18.

III. It does not appear from the bill of exceptions that the whole of the testimony is incorporated therein; it is therefore impossible for the Court to say that there was error in refusing the defendants or giving the plaintiffs instruction. Facts may have been proved, as for instance, admissions, promises, &c., which would have justified the Court.

IV. Orrin Wales was properly excluded from testifying for defendants. He had been one of the firm of Wales, Nelson & co., and on payment of this demand to Nelson by Dexter T. Wales, would be liable to contribution *prima facie*.

1. He was not made competent by the certificate of discharge in bankruptcy, for it does not appear that it was given in evidence. It is said he produced it, but that could be of no avail, unless it were given in evidence.

2. The bill of exceptions does not show that the whole of the testimony given in the case is included in it, a subsequent promise of Orrin Wales to pay or be responsible for his contributory share of this debt, may have been proved, thus making him liable notwithstanding his discharge.

V. The defendants were estopped to deny that the liability on which Nelson was forced to pay the money sued for, was the liability of the firm of Wales, Nelson & co., and therefore the testimony of Orrin Wales was properly excluded.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of debt on a bond brought by Reua Nelson, against Dexter T. Wales, John Smith and William H. White, the former as principal and the latter securities. The condition of the bond was that: "Whereas the firm of Wales, Nelson & Co., of which Dexter T. Wales and Reua Nelson were members, had been dissolved, and that said Nelson had transferred to said Wales, all his interest in the effects of said concern, for certain considerations, to-wit: Six thousand dollars in notes due said concern, then transferred to him, and his own private account due said concern, then declared satisfied, and cancelled, and also a bond of indemnity against the debts due by said concern, that therefore, if the said Dexter T. Wales should well and truly indemnify and save harmless

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the said Nelson against all debts, demands and liabilities of said firm of Wales, Nelson & Co., owing, or to be due by said late firm, or for which said late firm was or should be bound, and should discharge or satisfy the same within six months from the date of said bond, so that Nelson should never be molested by or on account of them, or any of them, then said bond should be void, otherwise, it should be and remain in force."

Among other breaches, the declaration sets forth a suit commenced more than six months after the date of said bond, by the South Bridge Bank, against Orrin Wales, Reua Nelson and Dexter T. Wales, composing said firm of Wales, Nelson & Co., which the declaration avers was prosecuted to a judgment, and the execution paid by said plaintiff with costs, &c.

The defendants pleaded: 1st. *Non est factum*. 2d. That said Wales had indemnified and saved harmless the said Nelson. 3d. That said Nelson had not been molested, &c. 4th. *Nul tiel* record as to the suit set out in the breach above referred to. Issues were taken and tried, and the verdict and judgment were for the plaintiff.

On the trial the plaintiff gave in evidence the bond sued on, and the record of the suit of the South Bridge Bank against Wales, Nelson & Wales. This record showed a judgment at the February term, 1843, of the St. Louis Court of Common Pleas, and on execution issued in Dec., 1843, which was returned satisfied by Reua Nelson. The defendants then offered in evidence the records of the proceedings in said case, subsequently to the entry of the judgment, from which it appeared that at the same term (February, 1843,) defendants (Wales)—(Nelson not joining) moved for a new trial; which motion was overruled on the 16th March, 1844; but subsequently on the 16th April, the order was set aside, and the motion sustained, the judgment set aside, and a new trial ordered, and a non suit entered by the plaintiff on the 30th Sep., 1844.

The defendants then offered Orrin Wales, to prove that the debt sued on by the South Bridge Bank, was the individual debt of Nelson (the plaintiff;) but the plaintiff objecting, the witness was excluded on the ground of interest; subsequently the defendants produced a certificate of discharge of said witness as a Bankrupt, and again offered him, but the witness was excluded.

The defendants asked the Court to instruct the jury that the judgment offered in evidence by the plaintiff in this case, was reversed or annulled by the judgment of the Court subsequently rendered, and that plaintiff cannot recover under the second breach, &c. The Court refused this instruction, but instructed the jury, that, if they believed that the plain-

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tiff Nelson, paid any money on the execution issued upon the judgment in favor of the South Bridge Bank, against Wales, Nelson & Co., they would find for the plaintiff the amount of such payment, unless the evidence was satisfactory that the debt on which such recovery was had, was not the debt of Wales, Nelson & Co.

A bill of exceptions was taken to the opinions of the Court, and the case brought here by appeal.

The propriety of the judgment in this case seems to depend mainly upon the value of the record offered and given in evidence by the defendants. That record comprehended the proceedings of the Court of Common Pleas, in the case of the South Bridge Bank, against Wales, Nelson & Co., subsequently to the rendition of the judgment. If the judgment in that case be unaffected by the subsequent proceedings, the rejection of the witness, Orrin Wales, could not have been prejudicial to the defendants. That witness was offered to prove that the debt upon which the judgment against Wales, Nelson & Co. was obtained, was an individual debt of Nelson; but that judgment, so long as it stood, being against Orrin Wales (the witness) Dexter T. Wales & Ruea Nelson, composing the firm of Wales, Nelson & Co., estopped the witness from saying that the recovery was had against him upon the debt of another. That judgment was entered at the February term, 1843; at the same term and on the day succeeding the one on which the judgment was rendered, a motion for a new trial was made by the Wales' (two of defendants) which was ultimately sustained by the Court; the judgment vacated a non suit entered. Can there be any doubt of the right of the Court to vacate the judgment? In *Crosswell vs. Bryne* 9 Johns R. 289,) it was held that a *vacatur* of a judgment entered on the minutes could not be received to contradict an enrolled judgment, upon the principle adopted by the Courts of that State from the British practice, that Courts will not regard any proceeding as a matter of record until it is enrolled, 1 Salk. 329. The decision admits the right of vacating judgments for irregularities or other cases shown, but decides that the evidence in that case was not of the right character. The practice of enrolling judgments does not prevail here. The record introduced by the defendants, then, showed a *vacatur* of the judgment, and this record was clearly admissible under the issue of *nul tiel record*. Was the plaintiff then *molested* within the meaning of the condition of the bond given by the defendants? Did the defendants design to protect Nelson against *illegal* molestations? Or was it not rather the obvious intention of the bond given to protect the plaintiff against *lawful* molestations? There can-



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not be any doubt, but that Nelson may recover back any money paid by him upon a judgment subsequently reversed, and it was surely not in the contemplation of the parties to secure the plaintiff against unauthorized exactions, for which he has his remedy.

Judge SCOTT concurring, the judgment of the Circuit Court is reversed and the cause remanded.

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ANDERSON & THOMPSON, ET AL. VS. ANN BIDDLE.

S. with the funds of B., purchased certain shares of stock of the St. Louis Insurance Company, for B., but had the stock entered in the name of S. S., however, never pretended to set up any claim to the stock, but informed the officers of the Company, and others, that it belonged to B. B., from ill health and other causes, had her business transacted by agents. No fraud upon the creditors of B. was pretended. An execution against S. was levied on this stock—

Held:—

1. That this case is not within the provisions of the statute of frauds.
2. That the stock is not liable for the debts of S.
3. That equity will interfere to prevent the sale by the sheriff, the remedy of B. at law, if any, being insufficient.

APPEAL from St. Louis Circuit Court.

CROCKETT & BRIGGS *for Appellants.*

SPALDING *for Appellee.*

POINTS AND AUTHORITIES.

A purchaser of property with notice, at the time of purchase, of another's equity in, or equitable right thereto, takes it subject to the same equity, and acquires no more right therein than the person had from whom he purchased. (2 Story's Equity 413, §1201;) Davis vs. McCloy, 2 Mo. Rep. 130; 1 Story's Equity 383, §395-6; *ibid* 396, §409-10, and the note at page 398; 2 Story's Equity 503, §1257; *ibid* 508, §1264; 1 J. C. R. 301, notice of an incumbrance stops all further proceedings towards the completion of the purchase or the payment of the money; 7 J. C. R. 65; 1 J. C. R. 566. If purchaser has notice of the trust at the time of the purchase, he himself be-

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comes trustee, notwithstanding the consideration paid. 2 Sugden on Vendors, 268-9. "If a purchaser have notice of any claim or incumbrance, his conscience is affected." It is a general rule that a purchaser with notice is, in equity, bound to the same extent and in the same manner as the person of whom he purchased. 2 Sugden on Vendors, 274, (top page 313,) notice before actual payment of all the money, though it be secured and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract. 2 Sugden on Vendors, 303, 456.

2. The statute of frauds has nothing to do with the case, it being personal property; but even were it land, it would not have embraced it. Rev. Code of 1835, page 283-4, §10 and 11. Where property is purchased with A.'s money, for A., and the title made to C., the fact may be shown by parol, even under the 10th section of act on frauds, which is similar to that in New York and England. 1 John. Chy. Rep. 341, 583; 2 John. Chy. Rep. 405; 2 Sugden on Vendors 135.

3. There is no proof that the complainants trusted Swearingen on the faith of his being the owner of the stock, or that they ever heard of that stock till about the time of the sheriff's levy. They therefore have not been injured by his apparent ownership of it, except so far as the costs of levy; nor is there any proof that he ever got credit any where in consequence of that stock, but there is evidence of the contrary.

4. That a levy was made under an *execution* gives no stronger claim on the property, than if a person had entered into an agreement with Swearingen to purchase it, being ignorant at the time of Mrs. Biddle's claim; and in either case, her rights would be secured by notice before the completion of the purchase by payment of the money and actual conveyance of the property. 2 Dallas Rep. 360, is a case of bill for restraining transfer of stock.

NAPTON, J., *delivered the opinion of the Court.*

This case was a suit in Chancery to enjoin the sale of certain stock in the St. Louis Insurance Company, which had been purchased by the complainant in the name and through the agency of J. T. Swearingen, and was taken in execution to satisfy his debts. The plaintiffs in the several executions, the defendant, Swearingen, the Insurance Company, and the sheriff, were made parties defendant to the bill. The complainant alleged in her bill, that she was the owner of the stock levied on, and always had been since the subscription for the same; that the stock was purchased and had remained in the name of the said Swearingen, as a matter of convenience to her at first, but that she had paid all the calls made by the Company, and that the Company through its officers had been apprised of her ownership. That through carelessness and inattention to her business, partly induced by ill health, the complainant had neglected to have the stock transferred to her, in consequence of which it had been levied on by the creditors of said Swearingen, he (Swearingen) being at the time of such levy totally insolvent. The bill prays an injunction to stay the sale, and that the said Swearingen executed a transfer of said stock, and that the same be entered on the books of the Company. An injunction was accordingly

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granted. Anderson and Thompson, who were partners, admitted in their answer the execution and proceedings thereon, but denied all knowledge of Mrs. Biddle's interest, and relied upon the want of equity in the bill. Swearingen, in his answer, admitted the facts stated in the bill, and further stated that he informed the officers of the Insurance Company, at the time the stock was taken, that it was for Mrs. Biddle; that he never drew any dividends, never considered or treated it as his property, or contracted any debts on the faith of it; that in 1840 or 1841 he had requested complainant to have the stock transferred to her own name, and in course of time thought this had been done, and when the executions were levied, it had entirely escaped his mind that the complainant's stock still stood in his name.

No question has been raised in this Court which renders necessary any detail of its testimony which was given at the hearing of the case. It appears clear that no actual fraud was contemplated by the parties in this stock transaction. It seems that the stock was taken in 1836, and that Swearingen failed in 1840 or 1841, and that the executions were levied in 1844. The testimony also shows, that Mrs. Biddle's health had been precarious for some years previous to the filing of the bill, during a portion of which time she was absent from St. Louis, and her business was transacted entirely by her agents; that she was the *bona fide* owner of the eighteen shares of stock levied on; that no motive could have existed on her part to place any portion of her property beyond the reach of her creditors. These facts are not disputed, and the only question is, whether the transaction is such an one as the law pronounces a fraud, so as to subject the stock in Swearingen's name to the payment of Swearingen's debts.

There is no provision in our statute concerning fraudulent conveyances which, in terms, embraces a case like the present. The first section is designed to protect the creditors of fraudulent *grantors*, where the beneficial interest in the property has been retained by such grantors, and a mere legal title conveyed to a third person. If the section be construed to extend to implied as well as express trusts, the creditors of Mrs. Biddle, in the present case, might claim its benefit to protect them against the legal title of Swearingen. But the creditors of Swearingen cannot expect to have the benefit of Mrs. Biddle's property to pay Swearingen's debts, unless that property has been placed in such a situation as to give Swearingen a delusive credit. The property levied on in the present case, does not seem to be of a character which could possibly be made to effect any such consequences. Swearingen could



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not obtain credit on the faith of being owner of this Insurance stock, for if inquiries had been made at the office of the Company, where alone information could be sought for, they must have resulted in a knowledge of the ownership of the complainant. In point of fact, Swearingen did not represent himself as the owner; but, on the contrary, informed every one who made any inquiries in relation to the matter, or who were entitled to correct information on the subject, that the stock belonged to Mrs. Biddle.

The fifth section of the statute is also relied on to subject this stock to the payment of the executions. That section, among others things, provides that reservations or limitations of property by way of condition or remainder, shall be void as against the creditors of the person in possession, unless such reservations have been made in writing and properly acknowledged and recorded. If we give this section a literal construction, it is obvious that it can have no application to the transaction now under consideration. There was no reservation by way of condition of remainder. Swearingen was a trustee by implication of law. But if it were conceded that the nature of Mrs. Biddle's title was such as to bring it within the spirit of the fifth section, it may still be questioned whether the property was of that character, the possession of which by a paper title could mislead or deceive any one, or give a false credit to Swearingen. Were choses in action within the contemplation of the law makers in framing the fifth section? Was it not merely designed to require the separation of title and possession in such property, only, as was capable of visible and tangible ownership, to be manifested to the world by being spread upon the public records?

As to the power of a Court of Chancery to grant an injunction in this case, we suppose it rests not so much upon the peculiar character of the property about to be sold, as upon the character of the complainant's title, which would prevent her from following the property in the hands of the purchasers, or maintaining trespass against the officer or plaintiffs in the executions. The remedy at law, if any existed, was at best incomplete and inadequate to the purposes of justice. The complainant was compelled to go into Chancery to get the legal title; without it she could not maintain her action at law, and without it, a sale under execution would have clearly passed a good title to the purchasers.

Decree affirmed.

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*The Bank of Missouri vs. Franciscus, and Martin vs. Franciscus.*

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## THE BANK OF MISSOURI vs. FRANCISCUS, AND MARTIN vs. FRANCISCUS.

1. Under the Bankrupt law of 1841, property acquired by a defendant after his application for the benefits of the act, and before his final discharge, is exempt from liability for debts which were proveable under the act—and not only as against those actually proved.
2. It is not necessary that the bankrupt should shew in his schedule that a debt was not fiduciary, to entitle him to this exemption, as the law will not presume a breach of trust.

## APPEAL from St. Louis Court of Common Pleas.

## GAMBLE, BATES &amp; POLK for Appellants.

## POINTS AND AUTHORITIES.

Upon the operation and effect of the Bankrupt act upon this case, the counsel of appellants assume the following positions as fully warranted by the law and the adjudged cases:

1. The Bankrupt act is an *exception*, in derogation of our general system of law, and therefore must be construed strictly. And hence it cannot take away rights of plaintiffs vested by the general law, unless the meaning of the Bankrupt act, plainly expressed, *must* have that effect.

2. The act gives no rights of property to the bankrupt, and imposes no restrictions upon the creditors, not coming in under the notice in bankruptcy and proving their claims, (except as to property conveyed to the assignee,) until final discharge and certificate. Under this head, it is insisted, that while the Bankrupt is left free to take the benefits the act gives him, the non-proving creditor is left equally free to adopt such legal remedies as are not taken away from him. And his claim being legal and valid, he is free to press it by legal process against any property of the Bankrupt, the title to which has not passed to the assignee. Certainly, the bankrupt, after the first decree, may acquire property; but he will hold it, like every other man, subject to legal liability. The *proving creditor*, by the terms of the 5th section of the act, has waived his right of action; but the *non-proving creditor* has waived nothing, and as the government has not yet exerted the sovereign power, in spurning out his debt and annulling his contract, there is nothing to restrain him from enforcing his judgment by the lawful means of a *fieri facias*.

3. Long before the discharge and certificate of the bankrupt, in this case, the claim of the appellant had ripened into judgment and execution. It no longer remained on the footing of a contract. It had become a debt adjudged, and that debt had been *discharged and paid*, by the actual levy upon property of the bankrupt. So that before the final discharge and certificate, the plaintiff's affairs with the bankrupt were past and finished. That such levy is a discharge of the debt, plainly appears by the following cases: Blair v. Caldwell, 2 Mo. Rep. 353; 4 Mass. Rep. 403; 7 Johns. R. 428; 12 do. 207; 6 Wend. Rep. 562. This doctrine is neither local nor new. It is laid down in 1 Salkeld 322, and distinctly declared in 2d Lord Raym. 1072.

4. The discharge and certificate cannot retroact, so as to make illegal and void that which was lawful and right when done. The statute does not say that the discharge shall have that effect. And such effect, if not positively unconstitutional, is against settled principles and the spirit of all our laws; for it would destroy vested rights on a mere notion of policy and by implication.

5. The bankrupt claims in this case, not only against the appellant, but against his own assignee, and all his creditors. So that if this Court should be of the opinion that the property levied on belonged to his assignee, then of course the rule must be discharged, leaving the assignee to assert his claim in his own way. In England, an execution levied on the goods of a bankrupt, after his

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certificate of discharge was signed, but not allowed by the Lord Chancellor, was holden to bind the property and take it from the bankrupt. See Cullen vs. Myrick, 1 T. R. 361; 1 B. & P. 427.

6. When the bankrupt claims that his debt is cancelled by virtue of his discharge and certificate, it is his business to show that the debt is *not fiduciary*, which is not done in this case. The granting clause of the act excepts *fiduciary debts*; and it is a rule of law that whoever claims under a grant, must show himself beyond and clear of the exceptions of that grant. See §1 of Bankrupt act; Edon on Bankruptcy, in Law Library vol. 35, p. 317 at top; 7 T. R. p. 27; 1 Burr. Rep. 148, Rex vs. Jarvis; 1 Strange 497, Rex vs. Sparling; 6 T. R. 559.

It is the duty of bankrupt to state in his schedule the true nature of his debt, so as to show whether it be *not fiduciary*; and his omission to do so, is a fraud. 2 Howard U. S. Rep. 209, Chapman vs. Forsythe.

LESLIE *for the Appellees.*

NATTON, J., *delivered the opinion of the Court.*

In the two above entitled cases there was a motion before the Court of Common Pleas, by the appellees, for a rule on the bank, and on the plaintiff Martin, to show cause why certain proceedings on two executions should not be stayed. The facts upon which the application was based, were set forth in the petition of Franciscus, and were these: On the 7th April, 1842, J. M. Franciscus filed his petition in the District Court of the United States for the District of Missouri, for the benefit of the Bankrupt law, the petition being accompanied with a schedule of his debts; and among others, the debts upon which the above suits by the bank, and by Martin, were instituted. Such proceedings were had upon this petition, that on the 11th day of June, 1842, said Franciscus was declared a bankrupt, and an assignee appointed to whom all his estate was surrendered. On the 17th May, 1842, he opened a broker's office in the city of St. Louis, and, by means of capital lent by his friends, he carried on said business and acquired by earnings, and by way of loan and deposit, a considerable amount of bank notes, depreciated paper, gold and silver, of the nominal value of \$3,876 04, which amount was, on the 26th January, 1843, seized by the sheriff of St. Louis county on the executions aforesaid, issued at the instance of the bank, and of Martin.

The motion to set aside the executions, and order a return of the money and effects to Franciscus, was sustained; and the only question to be determined here is the propriety of that decision.

By the fourth section of the act to establish a uniform system of bankruptcy throughout the United States, passed Aug. 19, 1841, it is provided that every bankrupt who has taken the steps prescribed by the act, and complied with all its provisions, shall be entitled to a certificate of final

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discharge from all his debts. It is further declared in the same section that such discharge and certificate shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements *which are proveable* under this act. The third section provides that all the property of the bankrupt shall, by the decree of bankruptcy, be *ipso facto* diverted from the bankrupt, and vested in the assignee; and by the fifth section it is directed to be distributed *pro rata* among the creditors. The act is silent as to property acquired subsequently to the filing of the petition, and previous to the final decree of discharge. Shall the property thus acquired go to the assignee, or be liable to the creditors of the bankrupt whose debts were proveable under the act, or will it be the property of the bankrupt, subject only to his debts contracted subsequently to the petition in bankruptcy?

To answer this question we must rather look to the general scope and obvious policy of the Bankrupt law of 1841, than to any special provision directly applicable to the subject. There is no provision made in the law which directs any property to be scheduled, or to be delivered over to the assignee, except the property of the petitioner at the time of his petition. Nor does the assignee in his report to the Court, upon which is based the final discharge, notice any property except such as is mentioned in the schedule filed with the petition. If it had been the design of the law to subject subsequent acquisitions to the payment of claims accruing prior to the petition and proveable under the act, it would surely have contained some provision by which the amount of such gains could be ascertained and reached. It is conceded that the language of the act, in terms, prevents any creditor whose claim has been presented and proved according to the provisions of the act from proceedings against after-acquired property; but a distinction is sought to be made between a *proving* creditor and *one who declines coming in* for his share of the bankrupt's estate. The latter, it is supposed, may prefer his chance of getting his money out of the subsequent acquisitions of the bankrupt, to the dividend which the Bankrupt law would give him, and by declining to prove up his claim before the assignee, he forfeits his share of the estate, but is not debarred from all the remedies which the law provides against property which the bankrupt has acquired subsequently to his petition and previous to his final discharge. It would seem that such an interpretation of the act would tend very much to defeat its purposes. The object of the act is clearly to discharge the debtor from all his liabilities at the time of filing his petition. If any creditor may, at his pleasure, decline the provisions of the act for his

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benefit, and by that means retain the power of harrassing the bankrupt until his final discharge is procured, it would frequently leave it in the power of creditors to defeat entirely the purposes of the law. Years may elapse between the filing of the petition and the final decree of discharge. Is it the policy of the law to prevent the bankrupt from engaging in any business during this interval, to suspend his industrial pursuits for an indefinite time? It is certainly very clear, that the Bankrupt law of 1841 did not design the bankruptcies therein provided for, to be within the power of creditors, but solely at the option of the debtors themselves, except in certain cases specified in the act. It would be very remarkable if, with this general plan in view, the act should have still permitted a single creditor to defeat the procurement of a final discharge, by withholding proof of his claim before the assignee, and levying his execution upon effects of the bankrupt acquired after the decree in bankruptcy. Such would be the inevitable result of such an interpretation of the law, unless we suppose that it contemplated a suspension of the bankrupt's pursuits, from the time of the petition until the final discharge—a supposition totally inconsistent with the general policy of the act.

An objection has been made in the argument at the bar, the schedule given in evidence as a part of the proceedings in bankruptcy, does not shew whether the debt was of a fiduciary character. If this were so in point of fact, we should not consider the objection a substantial one, for the law would not presume a breach of trust, where it was not shown to exist affirmatively. But so far as the attachment and execution of the plaintiff Martin, is concerned, the record shows that the debt was occasioned by the liability of the defendants as endorsers on a note for John Stagg & Co.

The judgment of the Court of Common Pleas is affirmed.

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STEVENS vs. SEXTON, USE OF SCHANCK.

No bill of exceptions being saved, the judgment of the Court below will be affirmed.



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*Swearingen, Samuel & Davis vs. Knox, adm'r, &c.*

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**ERROR to St. Louis Court of Common Pleas.**

**HOCKADAY for Plaintiff in Error, (written argument filed.)**

**R. M. FIELD for Plaintiff in Error, insists:**

1st. That none of the questions made on the trial are properly brought into this Court, as the motion for a new trial is not embraced in the bill of exceptions, and no exception appears to have been taken to the action of the Court on it. Nor does the bill of exceptions profess to set out the whole evidence.

That there must be a motion for new trial. See *Higgins vs. Breen*, and *Alexander vs. Schreiber*, decided at last term.

That the Court will take no notice of a motion for new trial unless it be preserved in the bill of exceptions. See *Benoist & Hackney*, 7 Mo. Rep. 224. *Alexander vs. Schreiber*, *ut supra*.

2d. That there was no error in the instructions and decisions of the Court below. The instruction as to the execution, is sanctioned by the authority of two cases in *Wendell's Reports*, expressly to the point: *Farr & Emmons vs. Smith*, 9 Wend. 338; *Toop vs. Bently*, 5 Wendell 276.

That the constable is liable for the acts of his deputies. See *Statutes of 1835*, p. 116, §5.

Besides, the evidence shows that the defendant below assented to the trespass of the deputy, and directed the sale of the horse: and a subsequent assent to a trespass, is equivalent to a prior command.

**SCOTT, J., delivered the opinion of the Court.**

No bill of exceptions having been taken on the overruling of the motion for a new trial in this cause, in the Court below, in conformity to repeated decisions of this Court, the judgment will be affirmed—Judge **NAPTON** concurring.

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**SWEARINGEN, SAMUEL & DAVIS vs. KNOX, ADMINISTRATOR, &c.**

1. Issues of fact cannot be tried by the Court on a submission of one party, in the absence of the other.
2. An objection to a special plea, that it amounts to the general issue, can only be taken by a special demurrer.
3. Where a note is executed by an agent, his authority must be proved.

**ERROR to St. Louis Circuit Court.**

**GEYER for Plaintiffs in Error, insists:**

1st. The case was set on the trial docket for the 21st May, and when it was called on that day there were demurrers undisposed of, so that according to the standing rules of the Court, it was

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*Swearingen, Samuel & Davis vs. Knox, adm'r, &c.*

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postponed until the next calling of the law docket. No reason is assigned, or appears on the record, for trying the issues out of the order prescribed by the rules. This is an irregularity, for which the verdict and judgment ought to have been set aside, on the motion of the defendants below. The overruling of the motion was, then, manifest error. That there was irregularity in taking up the cause out of its order, there can be no question. That the motion of the defendants was in time, is equally clear.

2d. There was both error and irregularity in allowing an amendment to be made in the record at a term succeeding that at which the judgment was rendered, pending a motion to set aside that judgment, upon the *ex parte* application of the plaintiff, without any notice to the defendant. *Curry vs. Henry*, 3 Johns. 140; *Killpatrick vs. Rose*, 9 Johns. 78.

3d. The application of the plaintiff was for an amendment of the judgment, and the Court proceeded to render a verdict on issues not before tried,—to determine issues of law not before determined,—and re-enter the identical judgment before rendered, all of which was done without notice to the opposite party, and while a motion to set aside the former judgment was pending; a proceeding altogether without warrant of law, and in total disregard of the rules of practice.

4th. Assuming that the Court might and did suspend its rules, and that it might do so without notice to any party at discretion, still there is error in sustaining the demurrers of the plaintiff to the fourth and fifth pleas. The declaration avers that the note sued on was made by the defendants, by and through Alex. T. Douglass. The pleas deny the power and authority of Douglass to make the note—thus tendering an issue directly on the authority of the alledged agent, which it was competent for them to do. That authority is made a constituent of the plaintiff's right, it is according to the declaration, a cardinal fact, without proof of which he could not sustain the action. It was not necessary to deny the execution of the note on oath. The note is not charged to have been executed by the defendants. If it had been so charged, it would still have devolved on the plaintiff to prove the authority on the trial. *Wahrendorff, et al vs. Whitaker, et al*, 1 Mo. Rep. 146. It is no objection to the plea, that the same matter would have been put in issue, by the plea of non assumpsit,—the same thing may be said of a plea of fraud, infancy, and a great variety of defences, which may be specially pleaded, or will avail the party on the general issue. In this case the plaintiff has chosen to make the averment of authority special,—and thus has made a material fact directly traversable.

5th. The bill of exceptions shews that the cause was taken up, and the issues of fact tried by the Court, in the absence of the defendants and their counsel. In this also there is error; the defendants had put themselves upon the country, and were entitled to a trial by jury, of which they could not be deprived by the act of the Court. The mere fact that they were not found insisting on a trial by jury, is not a waiver of their right. Having put themselves upon the country, the Court had no right to assume a waiver,—they never submitted the issues to the Court,—and without their consent, the plaintiff could not transfer the trial from the country to the court.

*DRAKE for Defendant in Error.*

*SCOTT, J., delivered the opinion of the Court.*

Henry Clark sued the plaintiffs in error, who were defendants below, in assumpsit, on a promissory note executed by them, through A. T. Douglass for \$850. The declaration contained two counts on the note, and also the common counts. There was an averment in the counts on the note that it was executed by the defendants, through their agent, A. T. Douglass.

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*Swearingen, Samuel & Davis vs. Knox, adm'r., &c.*

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To this declaration the defendants pleaded non-assumpsit, set off, and payment;—and to the two counts on the note pleaded, first, that Douglass was not their agent, and had not power to make said note; and secondly, that the note was not executed by them or their agent, thereunto authorized by them. Issues were joined on the first three pleas, and a general demurrer was entered to the two last. At this stage of the cause, the plaintiff Clark died, and the suit was revived in the name of William Knox, his administrator. In May, 1844, it appears that the parties came and submitted the demurrer to the Court, when it was sustained, and submitting the trial to the Court, the issues were found for the plaintiffs, and damages assessed, on which a judgment was entered. Afterwards on the 26th October following, the defendants moved the Court to set aside the judgment rendered in the cause. Afterwards the plaintiff moved to amend the entry of his judgment, which was accordingly done, *nunc pro tunc*. By this amendment it appears from the record, that the demurrers and issues were submitted to the Court by the plaintiff only, the defendants not being present, and who being called did not appear. After this the Court overruled the motion of the defendant to set aside the judgment. Exceptions were taken to these several proceedings of the Court. The record involves other questions, growing entirely out of the rules of practice of the St. Louis Circuit Court, which we deem unnecessary to notice.

The objection to the two last pleas was, that they amounted to the general issue. This defect could only have been reached by a special demurrer, therefore the Court erred in sustaining a general demurrer to them. *The Bank of Auburn vs. Jackson*, 19 Johns. 300.

As to the defect of the pleas to which a demurrer was entered, this it seems is the test, whether a plea in bar is bad as amounting to the general issue. Any matter of defence which denies what the plaintiff on the general issue would be bound to prove, may and ought to be given in evidence under the general issue. But a ground of defence which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove on the general issue, may be specially pleaded. 1 Chitty 557.

It was held in the case of *Wahrendorff & Ober vs. Whitaker and others*, 1 Mo. Rep. 146, that in an action on a promissory note, executed by an agent, and non-assumpsit pleaded, it was necessary to prove the agency, although the plea was not supported by affidavit, denying the execution of the instrument. These pleas then would seem to violate the rule above stated.



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*Crockett & Risque vs. Maguire.*

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It has been decided by this Court that where only one party appears, he cannot for the other dispense with a jury, and submit the trial of the issues to the Court. That a party cannot be said not to require a jury, unless he is present and waives it. *Sutton vs. Clark*, 9 Mo. Rep. 559. So in the case of *Pratte & Cabanne vs. Corl*, the Circuit Court in the absence of the defendants, assessed the damages which were unliquidated; when that case was brought to this Court it was held that, the defendants not appearing, the Court had no right to assume that they did not require a jury, and under such circumstances the damages could only have been assessed by a jury.

Judge NAFTON concurring, the judgment is reversed, and the cause remanded.

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CROCKETT & RISQUE vs. MAGUIRE.

A. purchases land of B., and to defraud his creditors has the title made to C. D. without notice of the fraud, acquires title under C. Before the deed to D. is recorded, the land is sold by the sheriff under an execution against A., and the deed of the sheriff is recorded.

Held:—

1. That the registry of the sheriff's deed is not notice to D. of the fraud.
2. The registry of a deed is only notice to after purchasers from the same grantor.

APPEAL from the St. Louis Circuit Court.

*SPALDING for Appellants.*

1. Where there is a deed fraudulent because made to hinder and delay creditors, and subsequent conveyances are made by the fraudulent grantor, and by the fraudulent grantee, the title will pass by the subsequent deed, which is first in point of time. 3 J. C. R. 371; *Anderson vs. Roberts*, 1 Day's Rep. 527, N. S.; *Preston vs. Crafeet*, 18 Johns. Rep. 515; *Anderson vs. Roberts*, on appeal, 15 Wend. 588. This is a case which is analogous in principle to the present, and the Court held the vendee bound to enquire whether the recorded sheriff's deed was *bona fide*, as against another deed recorded subsequently, but of prior date and execution.

2. That the application for a re-hearing was in time. See 2 Smith's Chancery Practice, 18, 26, 27. Showing that by the practice of the chancellor, several weeks were allowed. Here the time is not regulated by statute, nor by rule of Court. Till this is done, a re-hearing may be granted if applied for during the term wherein the decree is entered.

3. It is not too late to raise the question as to the legality of the proceedings at the hearing in the Court below.

*Crockett & Risque vs. Maguire.*

*HAMILTON for Appellee, contended:*

1. It is admitted that the appellee is a purchaser for a valuable consideration. On the point of notice, the case is clearly with him. The Court gave credit to the answer in preference to Collin's testimony, and its finding will be treated by this court with not less respect than the verdict of a jury, and will not be reversed upon a mere difference of opinion as to the weight or credibility of evidence, upon a fact fairly submitted to it. No decree can be made against the answer, unless it be contradicted by two witnesses, or one witness and strong corroborating circumstances. 4 Mo. 62.

2. The recording of the deed from the sheriff to Neville previous to the conveyance by the trustee, and *cestui que trust* to Hubbard, is relied on by the complainants, in their bill; but a purchaser of land is not affected with constructive notice of any thing which does not lie within the course of his title, or is not connected with it. If he finds a good conveyance to his vendor, he is not expected to look further, much less is he bound by a deed out of that title, as in this case. 7 Watts 382; 10 Ohio 83; 1 John. C. R. 573; 14 Mass. 303; 16 Mass. 418. The recording of the sheriff's deed was only evidence of notice to after-purchasers under the same grantor. 14 Pick. 224. A *bona fide* purchaser for a valuable consideration, from a fraudulent grantee, without notice of the fraud, will hold the property against the creditors of the fraudulent grantor, and the purchaser from the fraudulent vendee is preferred to one who buys from the vendor. 5 Mo. 296.

3. Hubbard also purchased without notice, and no notice was proven against Arnout, the immediate grantor of the appellee. It is now settled that having taken the property in payment of a precedent debt, does not affect the right of a party to be considered a purchaser for value. 5 Mo. 296; 16 Peters 1; 11 Ohio 172.

4. If Hubbard or Arnout had no notice, the appellee may avail himself of that fact whether he personally had notice or not. 7 Cowen 360. So if the appellee had not notice, but the other parties had, the same rule will apply. 8 John. 137.

5. The appellants show no valid title to this title, for:

1st. The sale to Neville passed nothing, there being, in fact, no title in Wetherill upon which the judgment and execution could act. The title was then outstanding. Neville at most, acquired but a mere equity, authorizing him to pursue the property in a mode effectual to divest the title, and attach it to his equity. This should have been done before the right of innocent parties had intervened. By acquiescence and neglect that right has been lost. We have united to the superior equity, the legal title itself.

2nd. By taking a voluntary confession of judgment from Witherill alone, Neville confined his action under the same, to the separate interest of Wetherill. The bill alleges that this property was purchased by the firm, which was insolvent. Even then upon the supposition that Foster and Virginia participated in the fraudulent scheme charged, there was no *separate interest* in Witherill, which could have been the subject of levy and sale upon this judgment. 18 John. 459. Approved in 2 Mo. 66; 1 Wen. 311; 4 Paige 35.

6. By his deed to Foster, in trust for Mrs. Wetherill, Collins supplied the means of practicing fraud. He and all claiming under him, are estopped from denying, as against an innocent third party, the true import, character, and design of that deed. 4 Mo. 511.

7. Collins was interested to destroy the appellees' title, as in accomplishing this, the covenant running with the same, in the hands of the appellee and still binding on him, would necessarily become extinguished. An interest in the event is decisive of his incompetency.

8. The questions made by the appellants, do not properly arise on this record. During the progress of the hearing, no ground of complaint to the action of the Court appears to have existed on the part of the appellants. No exception was taken, no point of law or fact was distinctly presented to the notice of the Court, and not until four days after the hearing and entry of the decree, do they move for a re-hearing, and the only exception taken is to the overruling of that motion. 7 Mo. 253; 8 ib. 657, 702; 4 ib. 501; Swearingen vs. Newman, 4 Mo. 456.

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*Crockett & Risque vs. Maguire.*

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SCOTT J., *delivered the opinion of the Court.*

This was a bill in equity, brought by Crockett & Risque, the appellants, against the appellee Maguire. "The bill charges that Witherill & Foster purchased of Charles Collins, two lots of ground in St. Louis, and that for the purpose of defrauding their creditors, they caused Collins to convey said lots to Wm. P. Foster, the father-in-law of Witherill, in trust for the use of Virginia Witherill, the wife of John Witherill, one of the persons above named of Foster & Witherill.

Collins received no part of the purchase money from Wm. P. Foster, or Virginia Witherill. This deed was dated February 2d, 1839. On the 7th June, 1839, Foster the trustee, and Virginia Witherill, conveyed the lots to Russell Hubbard, and afterwards by several intermediate conveyances, the lots passed to Maguire the appellee. That Maguire, and each of those through whom he derives his title had notice of the fraud committed by Foster & Witherill. That by virtue of a judgment and execution against Witherill in March, 1830, the lots were sold and conveyed to Jas. Neville. This judgment was on a debt of the firm of Foster & Witherill, and was due to Neville, the purchaser of the lots at the Sheriff's sale. In September, 1830, Neville conveyed to Chas. Collins, and during the month following, Collins conveyed to Thomas. In 1836, Thomas re-conveyed to Collins, and by several intermediate conveyances, the lots passed to the appellants. This bill prayed that the deed, under which Maguire the appellee, claimed, might be set aside, and that the possession of the lots be restored to the complainants.

Maguire, the appellee, in his answer admitted the conveyance from Collins to Foster in trust, and that before the conveyance by said trustee and *cestui que trust* to Hubbard, that John Witherill confessed a judgment in favor of said Neville for \$1017, upon which judgment an execution was issued against the said Witherill and his interest in the lots sold and conveyed as stated in the bill. Admits the existence of the several conveyances in the bill mentioned, from Neville down to that of the complainants. Admits that he is in possession, and that his title is derived as stated in the bill, and denies all notice of the trust, and of any fraud committed by Witherill in making the purchase from Collins.

To this answer a replication was filed, and the parties went to trial when the complainants bill was dismissed, from which decree he appealed to this Court. Charles Collins, who was a grantor in the claim of title of each party to this controversy, was examined as a witness and gave some testimony conducing to show fraud in the conduct of John Withe-

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rill and some of the grantees claiming under William P. Foster, and Virginia Witherill. Some evidence of a like import was given by other witnesses. The testimony of Chas. Collins was objected to. We need not enter into the question of the admissibility of the testimony of Collins, as it entirely fails to establish the fact that the appellee was effected with any notice of the fraud of John Witherill, or that his immediate grantor had any notice of his fraudulent conduct. Nor is the fact of notice established by any other witness.

If then notice cannot be imputed from this source, it remains to be inquired into, whether the record of the sheriff's deed was any notice to purchasers of the lots who acquired them subsequent to its registry.

Collins conveys to Wm. P. Foster in trust for Virginia Witherill, wife of John Witherill, who is in failing circumstances, and who causes the conveyance to be made in that manner in order to defraud his creditors.— Afterwards, but before Foster and Virginia Witherill convey to R. Hubbard under whom the appellee claims, there is a judgment and execution against John Witherill, by virtue of which the lots are sold, and a deed is made and executed. The purchase money having been paid by John Witherill, it may be conceded that a trust resulted to him and that he is in equity the owner of the land, yet on what principle is the record of the sheriff's deed conveying his equity evidence against those claiming under Foster and Virginia Witherill, in whom the legal title is? There is nothing on the registry connecting Jno. Witherill, in any shape, with the title derived from Collins. If it is necessary to examine the sheriff's deed to Neville, conveying John Witherill's equity, then it was equally necessary to examine every deed on record; so it amounts to this, that a person taking land under one grantor would be required to search the record from beginning to end in order to ascertain whether some other person did not assume to convey the same land. The registry of a deed is only evidence of a notice to after-purchasers under the same grantor. Even if a purchaser was bound to look for conveyances from those under whom he claims, as well as to them, that he may see if the title has not been diverted from the channel which conveys it to him, yet that principle would not help this case, for as has been observed there is nothing in the record of deeds showing any connexion of John Witherill with the title derived from Collins. This case is said to be analogous to that of Jackson vs. Post, 15 Wend. 589; but upon examination it will be found that there is an obvious distinction between them. In that case Merrick conveyed to his son, and before the son's conveyance was put upon record, there was a judgment and execution against

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Merrick, the grantor, under which the land conveyed to the son was sold, and the sheriff's deed recorded. Afterwards the son's deed was recorded, and the purchaser at the sheriff's sale being affected with notice of conveyance to the son, he sold to a purchaser without any other notice than that imported by the registry of the son's deed subsequent to the sale by the sheriff. Under these circumstances, the Court held the son entitled to the land. Now if in the case before the Court, Foster and N. Witherill had been the source of the title of each party to this controversy, the cases would have been parallel, but instead of the parties here claiming under one and the same grantor, they are really claiming under different grantors. Indeed, it may be remarked, that the case of Jackson vs. Post, above cited, is contradicted by the case of Trull vs. Bigelow, 16 Mass. 405. Nor do we consider that the case of Anderson vs. Roberts, 18 John. Rep. 514, in which it was held that when there is a deed fraudulent because made to defraud creditors, and subsequent conveyances are made by the fraudulent grantee and the fraudulent grantor, the title will pass by the subsequent deed, which is first in time, which is analogous to the present one. The plain distinction pointed out between this case and that above cited, of Jackson vs. Post, exists also between the case of Anderson vs. Roberts, and that now under consideration.

Judge NORTON concurring, the decree will be affirmed.

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SALTMARSH, ET AL VS. ROWE & VANDEVENTER.

Where several persons engage in the building of a steamboat, all the owners are liable for materials furnished for its construction, although purchased by one, there being no evidence to shew that there was any agreement to give the credit alone to that one, even though there may have been an agreement between the owners that each should build a particular part of the boat.

APPEAL from the St. Louis Court of Common Pleas.

TODD & BATES for the Appellants.

I. The Court erred in refusing to give to the jury the following instructions asked for by defendants:

1. The instruction that "unless the jury find from the testimony that Benjamin T. Osborne was



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the agent of the other defendants named in the declaration, (except the Hites,) with authority from them to contract with the plaintiffs for the lumber, the value of which is now sued for, they will find for the defendants," ought to have been given, because, unless their authorized agent therefor his contracts could bind only himself. For their general relations with each other with regard to the boat were, at the most, those only of tenants in common, and one tenant in common cannot *ex vi termini* bind his co-tenants as to third persons by any contracts of his, touching the property held in common, nor to himself without their express prior assent, except perhaps in cases of necessity, and then only on express prior request and refusal, unless before made general agent therefor. 3 Kent's Com. p. 151 to 157. That they are tenants in common. 6 Cowen Rep. p. 475. That the contracts of each don't bind the rest. 8 Mo. Rep. 358-360. Gow on Partnership p. 64-5. 3 Kent's Com. p. 63. That partners after dissolution are tenants in common, and their acts and declarations cannot bind their co-tenants except in matters happening during their partnership. 3 J. R. p. 175; 8 Mo. Rep. 358. That tenants in common are unlike partners. Gow on Partnership, p. 194 n. x; 20 J. R. 611.

2. The instruction that "unless the jury find from the testimony that Benjamin T. Osborne at the time of making the note, which is in evidence, was clerk of the steamboat Potosi, they ought not to find for the plaintiffs as to that note," ought to have been given, because unless such clerk, it is the note of Osborne alone. Bank of Missouri vs. Scott, 1 Mo. Rep., p. 533, of new publication p. 744 margin.

The Court also by letting in this note, and refusing said instruction, in effect told the jury that if they believed that Osborne was part owner, he could bind his co-owners by any kind of contract in behalf of the boat and by notes—that he was their agent because part owner.

3. The instruction, "in this action the jury ought not to find against any one of the defendants unless they think such defendant was an owner of the steamboat Potosi, and authorized the purchase of the lumber," ought to have been given, because if an owner, but not authorising, his position and liabilities are those only of a tenant in common, and therefore not liable.

4. The instruction, "if the jury believe from the evidence that a contract was made between Osborne and the others of the steamboat Tide, when she was broken up and the building of the Potosi begun, that Osborne was to build at his own expense the cabin, and that the expense thereof was to be allowed him towards his contributory share in the building of the Potosi, and that said Osborne did build the cabin in pursuance of such contract, and that the said plaintiffs dealt with Osborne only in selling the lumber, giving credit, demanding and receiving payment until the maturity and protest of the note given by Osborne, they will find for all the defendants except Osborne," ought to have been given, because if Osborne bought this lumber for a purpose solely his, and the plaintiffs dealt with him alone, Osborne alone is liable for the lumber. 11 Mass. R. p. 35.

II. The Court erred in giving the two following instructions, to-wit:

1. "If the jury believe from the evidence that one or more of the defendants were part owners of the steamboat Potosi, at the time plaintiff's account accrued, and that the lumber therein charged, was used in the building of the said steamboat, the said part owners are liable to the plaintiffs for the same." Because one tenant in common is not liable for the contracts of his co-tenant touching their common property by the law of their relation.

2. "The jury will state in their verdict for which of the defendants they find, and against whom, with the amount—also, any arrangements between the defendants as to what part of the boat any one should construct, does not affect the plaintiff's right to recover against all who are part owners, unless it be that the plaintiffs knew of these arrangements." Because under such an arrangement each one's work is exclusively his until the completion of the boat, and then those holding it together, hold it as tenants in common.

III. The evidence shows that the plaintiff below gave the entire credit to Osborne, and looked to no further security except their lien upon the boat. 11 Mass. Rep. p. 34.



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IV. The Court erred in refusing to grant the motion for a new trial. Because the verdict is against evidence in this, that it does not prove a contract to which the appellants are parties at law—for the contract proved was between appellees and Osborne only; appellees sold to Osborne alone, and Osborne alone bought the lumber. The appellants are certainly not proved to be express parties to the purchase, neither can they be bound on an implied contract because the lumber was put in a boat which, when completed, was property in common between Osborne and them. Because till the lumber was put into the boat the appellants had no claim in the lumber, it was Osborne's, and he could do with it as he choose; but when put into the boat it lost its character as lumber, and became parcel of the boat, and also its individual character of the sole property of Osborne; and becoming merged in the boat, obtained the character of property in common between appellants and Osborne.

*POLK for the Appellees.*

The counsel of the appellees maintains that the instructions given by the Court, are the law of this case. To the second instruction given by the Court, it is taken for granted that no objection can be reasonably raised.

That the first instruction was properly given by the Court, reference is made to the following authorities: Abbott on Shipping, 71-2; Westerdell vs. Dale, 7 T. R. 306; Rich, Ex'r. vs. Coe, et al, Cowper 636; 7 Johns. R. 311; 16 do. 89; 1 Dallas 129.

In this case the purchase was made by Osborne, who acted as clerk, and who was one of the owners, and the amount was charged against the boat and owners. It therefore fully meets the case given Johnson's Reports, and is much stronger than the case in Term Reports, where the owner, who was sued, not only did not authorize the purchase, but was not even charged with the goods.

That the third instruction given by the Court is correct, see Rich, Ex'r. vs. Coe, et al, Cowper 636.

The counsel of appellees also contends that the Court below committed no error in refusing the four instructions prayed by appellant's counsel in the court below. 7 Mo. R. 416; 1 do. 505, and 1 do. 68 or 97; 3 do. 411; 6 do. 6; 3 do. 382 and 359; 7 do. 128 and 430; 8 do. 339.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of assumpsit, instituted by the appellees, Rowe and Vandeventer, against the appellants, Edward and Charles H. Saltmarsh, Benj. T. Osborne, Nicholas Wall, and George and Wm. Hite, alleged owners of the steamboat Potosi. The declaration contained a count on a promissory note, charged to have been executed by the defendants, *per pro curationem*, and also the common counts. The defendants below, prayed a bill of particulars of the plaintiff's demand under the common counts, and the plaintiff filed as such bill of particulars an account for lumber furnished, which was the consideration of the note sued on. On the plea of non-assumpsit the parties went to trial, and the issue was found for the plaintiffs, and their damages assessed to the amount of \$366 02, which was the amount of the bill for the lumber furnished and

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interest. Before the trial the plaintiffs entered a *nolle prosequi* as to two of the defendants, George and William Hite, and judgment by default having been taken against Osborne, the issue was found against the other defendants, and damages assessed as aforesaid.

The following is the substance of the testimony in the cause:

Thomas H. Hatch being sworn, testified that he knew the plaintiffs and their co-partnership, which was formed in February, 1842, and they composed the firm of Rowe & Vandeventer; that he had been their clerk; that plaintiffs traded in lumber; that witness sold and delivered for them; that he knows the handwriting of Benjamin T. Osborne; that the signature of said Osborne to the note shown to him at the close of the plaintiff's case, given in evidence, which was of the following tenor, to-wit: "Dolls 327 42-100. St. Louis, July 27, 1842. Ninety days after date, steamboat Potosi and owners promise to pay to the order of Rowe & Vandeventer, three hundred and twenty-seven 42-100 dollars, for value received, negotiable and payable without defalcation or discount. B. T. OSBORNE, Clk."—[Protested for non payment October 28th, 1842. ANDREW ELLIOTT, N. P.]—was the handwriting of said Osborne; witness had seen said Osborne on board said boat as clerk; that he did not know that said Osborne was clerk of the steamboat Potosi only as he understood; he had seen him on said Potosi, but did not know of his acting as clerk except in buying the lumber suit for in this suit; that said note was given for the lumber as set forth in the bill of particulars filed in this case for the said Potosi; that the body of said note was written by said Rowe; the lumber was bought by said Osborne; witness sold and delivered it all excepting a few items, amounting to \$8 93; this, said Rowe sold; the lumber was used in making the cabin of said Potosi, which was built at Captain Case's yard; that the signature of said Osborne to the affidavit to the bill of said lumber, first made out and shown to the witness, is Osborne's, which bill and affidavit were in the words and figures following, to-wit: (this bill contains the same items as that filed in the bill of particulars in the case, and at the foot of it is an affidavit of Osborne's, in the following words:)

State of Illinois,        }  
County of Adams,       } ss.

I, Benjamin T. Osborne, being duly sworn, depose and say that the within account of Rowe & Vandeventer against the steamboat Potosi is a true, just and correct account, and that the balance of three hundred and twenty-seven 42-100 dollars, as appears by said bill, is justly

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due and owing from said steamboat Potosi to said Rowe and Van Deventer, so help me God. B. T. OSBORNE.

Subscribed and sworn to this 12th day of November, A. D. 1842, before me, EBEN MOORE, J. P., Adams co., Ills.

Osborne engaged the lumber and paid the money credited on the bill of particulars; don't know who were the owners of the said Potosi only from said Osborne; Osborne said he was part owner; the prices set forth in said bill of lumber were the market prices both for that he sold and delivered, and that said Rowe did. On cross examination he testified, that all he knows of the said lumber sold by said Rowe is, that said Rowe told him, and the original charge is in the handwriting of Rowe, who was in the habit of selling and delivering lumber himself; the lumber was taken to said Potosi where she lay for completion, which was at the river at St. Louis, opposite the lumber yard of the plaintiffs; he demanded pay for the lumber of Osborne only; he never demanded pay for the note; Osborne himself called for the plaintiff's bill for the lumber sold as aforesaid.

Henry M. Snyder, sworn on the part of plaintiffs, testified that he knows the steamboat Potosi; it was built at the yard of Captain Case; he did some castings and other work, as a founder, for her engine; he is a founder; at the time he was doing the work in April, 1842, Charles H. Saltmarsh told him he was one of the owners, and his brother Edward also; Edward, in July, 1842, told witness that he was one of the owners; he then presented his account for payment to Charles, and Charles said he would show it to his brother Edward, who looked at it, said it was right, and directed him to go to the office for his pay; he don't know, only by sight, who was clerk; he had seen the same person frequently on the boat; before then he had a conversation with Edward on the boat, while the cabin was building, in which he told witness he was one owner; he believes there were other owners, but he don't know who they were; the cabin was being built, he thinks, in June, the boat lying just below the dry dock; at the last conversation he thinks the cabin was up; don't recollect when she begun running, but it was some time in July or August, as near as he can recollect. On cross examination he testified that the boat had been running when he presented his bill; the above conversation in April took place with said Charles, when they, that is Charles and others, were removing a portion of the steamboat Tide to the Potosi; the engine was put into the Potosi; the object of the conversation was to ascertain who would pay him for his work; Charles Saltmarsh said that he and his brother were the owners and would pay him.

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Calvin Case, sworn in behalf of the plaintiffs, testified that he was the owner of the boat-yard where the Potosi was built; he built the hull of the Potosi under a contract with Edward Saltmarsh; Edward was frequently present; he did not build the cabin; he saw Osborne superintending the building of the cabin, and he seemed to take the management of this part of the work; he saw him frequently about the boat in company with the Saltmarshs; in January, 1842, he made his contract for the hull with Edward, and completed it in March or April; he heard Osborne and the Saltmarshs conversing together during the progress of the work, but don't recollect the purport of the conversations, but they had reference to the manner of doing the work; knows Nicholas Wall, and thinks after the boat began to run, he said he was part owner; did know him before; had not seen him about the building of the boat; knows George and William Hite, and thinks he has seen the Hites about the boat while building, but they said nothing about having any interest in the boat. On cross examination testified, that his boat-yard was the first establishment in St. Louis, and that it was customary for persons engaged in steamboating to come to the yard and advise, suggest and talk about how boats should be built; Edward paid him for building the hull, except \$150, which Charles H. Saltmarsh, during the building of the hull, paid him, saying that he had lent it to Edward for that purpose; the Potosi began to run in July; he don't know who was clerk at starting, but Mr. Wall was shortly after; he sent some chimneys, and as there was some difference about the price, they left it out to others, and Osborne attended to it; the Saltmarshs have been engaged for some considerable time in steamboating on the river; Charles H. was engaged on the Rosalie, till the hull of the Potosi was launched, and then he left her and went to putting the engine on board the Potosi; he seemed to be engaged in the building as much as the others, but they said Edward was the only owner; Charles H. and Edward are brothers, and the conversations at the boat-yard, while the hull was building, was about the manner of building it, but he understood that Edward was the only owner; Edward paid him, he thinks, about \$2800 for building the hull. Re-examined in chief, he can't say who was clerk of the boat of the boat before it run; he can't say whether it was just before or after the boat began to run that he delivered the chimneys, they were bargained for before; he talked with Edward and Charles H. about them; he contracted with no one for them but the Saltmarshs; at first Edward objected to the price, and Charles H. afterwards met him upon the sidewalk and said they would leave *out* to others; he can't say whether Charles H. talked for himself

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or Edward, as agent.—(The plaintiffs here entered a *nol pros.* as to the Hites.)

In behalf of the defence, Mr. O'Flagherty being sworn, testified that he has known the Potosi from the first, that Mr. Wall was the only clerk he ever knew upon her; he was also clerk of the Tide; he and his partner deal in boat stores upon the levee, and have sold the Potosi, before and since her building, boat stores. On cross examination, testified that he did not know Osborne; that he furnished spikes to the Saltmarshs, and charged them to the steamboat Potosi; he did understand that Charles H. was liable for the spikes; he was helping to put the engine in, and, after the Potosi began running, was engineer; Charles H. ordered the things, and so do all engineers in putting up works; he was surprised to see that Charles H. was on her as engineer.

Jesse Davidson, sworn in behalf of the defence, testified that he knew the steamboat Tide; Osborne bought out Mr. Waggoner's interest in the Tide, which was one-fourth; Charles H. Saltmarsh was not part owner of the Tide that he ever knew of; the owners of the Tide, when the building of the Potosi was began, and portions of the Tide were taken to be worked into the Potosi, were himself, Edward Saltmarsh, and said Osborne and Wall; Edward Saltmarsh, Nicholas Wall, Benj. T. Osborne and witness, were the owners of the Potosi; he sold his interest in the Potosi to Charles H. Saltmarsh, and made to him a bill of sale, which was in the words and figures following, to-wit: "Know all men by these presents, that I, Jesse Davidson, of the first part, do hereby convey, grant, bargain, sell and alien, unto Charles H. Saltmarsh, of the second part, all my right, title, and interest I had in the steamboat Tide, being one-fourth thereof, free from all incumbrances whatsoever, also my interest in all debts due and monies belonging to said steamboat Tide, which may be on hand, together with my right and interest in the new steamboat Potosi, which was built for, and has on it, the machinery of the above mentioned steamboat Tide. For and in consideration of five hundred and sixteen dollars and 66-100, the payments of which to be as follows: One hundred dollars on the 11th of August, 1842, and four hundred and sixteen dollars and 66-100, on the 28th of October, 1842. In testimony whereof, I have hereunto set my hand and seal this eleventh day of July, 1842.

JESSE DAVIDSON, [seal.]

Witness: B. T. OSBORNE."

On cross examination, testified that the sale of his interest to Charles H. was, as he believes, of the date the bill of sale bears; as much of the Tide was used in the Potosi as could be; Edward Saltmarsh, Nicholas



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Wall, C. Waggoner, and himself, owned each one-fourth of the Tide; he did not know of the lumber being got by Osborne of the plaintiffs; he was sick while the Potosi was building.

Mr. J. Jones, sworn on the part of the defence, testified that he has known the Potosi from the commencement of her running; he became acquainted with her through Mr. Wall; he taught Mr. Wall book-keeping; Mr. Wall was the clerk of the Potosi at the commencement of her running; don't remember the time she began to run; he had access to the boat's books as an assistant of Mr. Wall in keeping them; he has never known of any other clerk of the Potosi. On cross examination, testified that he never went on the boat only when she was in port; knows Mr. Osborne, but never knew him as clerk of the Potosi; he was on the boat from time to time when she was in, and helped to keep the books in order; knows that Osborne was on the boat, and thinks he acted as second clerk.

Henry Peers, sworn for the defence, testified that he knows the Potosi; that he was employed as joiner on her while building; his work was confined to the building of the cabin; Osborne hired him, paid and discharged him when the boat was finished; he never applied to any one else for pay; Osborne formerly resided at Quincy; Osborne told him that he had bought one-fourth of the Tide, and that they were going to build the Potosi; and that he was to build the cabin, and what that cost he was to be allowed so much in the Potosi; he was present at the building of the cabin, off and on, from its commencement, and Osborne was the only man who gave me directions and orders, and employed the hands working upon it, and no other person employed them; he worked as joiner for about six weeks of the latter part of the time the cabin was building; the cabin was finished about the 10th of June; the Potosi started her first trip on the 17th of July; N. Wall was the clerk; it was in July that he he heard that Charles H. Saltmarsh had bought out Davidson. On cross examination, testified that both of the Saltmarshs were on and about the boat while it was building; neither of the plaintiffs was present when Osborne told him as aforesaid.

Hiram Miller, sworn for the defence, testified that he knows the steam-boat Potosi; he helped to put up her engine; the cabin was built while he was working on the engine; the boilers were up and the engine on the boat when Charles H. Saltmarsh came to work on the boat; Osborne was building the cabin; knows that Osborne employed the hands for making the cabin; don't know if any other person employed hands on the cabin; Edward Saltmarsh hired him to work on the engine and



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shafts; he is a mill-wright; Osborne paid the joiners who worked on the cabin; knows of no one else paying them; Osborne once went up to Quincy on business, and was not present on Saturday night when the pay of the hands upon the cabin was due, and the hands applied to Edward Saltmarsh, who refused to pay them, saying that he had nothing to do with them; Edward Saltmarsh paid him; Charles H. Saltmarsh was employed as engineer on the steamboat Rosalie till he came to work on the Potosi. On cross examination, testified that he was present at the employment and payment of the joiners upon the cabin; Edward Saltmarsh, while the hull was building, was repairing the old engine of the Tide.

William Hite, sworn for the defence, testified that he knows the Potosi; he has known her from the time she was begun to be built; the Potosi started on her first trip July 17, 1842, he was on her as pilot; Nicholas Wall was clerk of the boat on her first trip, and continued so for two years; he don't recollect the exact date when Charles H. Saltmarsh bought Davidson's interest, but it was after she was finished; he, the witness, became part owner of the Potosi, July 18, 1842; he bought a one-sixteenth of Charles H. Saltmarsh, who on the same day sold one other sixteenth to Charles Chaplin; it was only three or four days before then that Charles H. bought of Davidson; he never heard of Charles H. Saltmarsh owning any thing of the Potosi before he bought of Davidson. On cross examination, testified that the way he knows of the time when Charles H. Saltmarsh bought of Davidson is, because he tried to buy of Davidson, but there was some difficulty, and so Charles H. bought, and then he bought of Charles H. Saltmarsh.

The defendants, after the close of the evidence, asked the following instructions, which the Court refused to give:

"Unless the jury find from the testimony that Benjamin T. Osborne was the agent of the other defendants named in the declaration, (except the Hites,) with authority from them to contract with the plaintiffs for the lumber, the value of which is now sued for, they will find for the defendants."

"Unless the jury find from the testimony that Benjamin T. Osborne, at the time of making the note, which is in evidence, was clerk of the steamboat Potosi, they ought not to find for the plaintiffs as to that note."

"In this action the jury ought not to find against any one of the defendants unless they think that such defendant was an owner of the steam boat Potosi, and authorized the purchase of the lumber."

"If the jury believe from the evidence that a contract was made be-

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tween Osborne and the others of the steamboat Tide, when she was broken and the building of the Potosi begun—that Osborne was to build at his own expense the cabin, and that the expense thereof was to be allowed him towards his contributory share in the building of the Potosi, and that said Osborne did build the cabin in pursuance of such contract, and that the said plaintiffs dealt with Osborne only, in selling the lumber, giving credit, demanding and receiving payment until the maturity and protest of the note given by Osborne, they will find for all the defendants, except Osborne.”

To this refusal the defendants excepted. The Court then gave the following instructions, viz :

“If the jury believe from the evidence that one or more of the defendants were part owners of the steamboat Potosi, at the time plaintiff’s account accrued, and that the lumber therein charged was used in the building of the said steamboat, the said part owners are liable to the plaintiffs for the same.

“The jury will state in their verdict for which of the defendants they find, and against whom, with the amount, also any arrangements between the defendants as to what part of the boat any one should contract does not affect the plaintiff’s right to recover against all who are part owners, unless it be that they, the plaintiffs, knew of these arrangements.”

To the giving of which the defendants excepted. The Court then gave the following instruction at the instance of the defendants, viz :

“The jury ought to find for such and so many of the defendants as they shall believe from the evidence, were not part owners of the steamboat Potosi at the time of the furnishing of the lumber sued for in this case.”

A motion for a new trial having been refused, the defendants appealed to this Court.

The evidence in the cause warranted the Court in giving the instruction to the jury, that if they believe from the testimony that one or more of the defendants were part owners of the steamboat Potosi, at the time the plaintiff’s account accrued, and that the lumber therein charged was used in building the said boat, the said part owners are liable to the plaintiffs for the same. This instruction contained, as it seems to us, the law applicable to the case.

It is said a ship is usually conveyed by bill of sale, or some writing of that nature, to different persons, in several and distinct shares, and consequently the several part owners thereby become tenants in common with each other of their respective shares. Abbott 68. Part owners of a ship are tenants in common, and one cannot dispose of the interest of

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another. But with regard to the repairs of a ship, and other necessities for the employment of it, one part owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability is expressly provided against. *Ibid* 76. This is the English law, and Judge Story says that our own law coincides with that of England in holding all the part owners liable for repairs and necessities furnished the ship. Not only the ship's husband, but all the owners, are liable therefor, notwithstanding they are ordered by him. The cases of *Schemerhorn vs. Loines*, 7 John. 311, and *Muldow vs. Whitlock*, 1 Cow. 390, clearly maintain this doctrine. In this last case, stores were furnished at the instance of the ship's husband, on a credit, who, with others, were the owners. The stores by the original entry were charged to all the owners; a few days after the sale, bills were rendered, in which the ship's husband was only charged, and after two months a note of the husband's was taken at an extended credit of eight months, a receipt being given for the note as in full for the stores. This note not being paid, the ship's husband becoming insolvent, it was held that the other owners were not thereby discharged, but were liable for the original consideration, and that it made no difference whether those who supplied the stores, knew that there were other owners or not..

We can see no distinction between stores, necessities, &c., furnished a vessel, and the materials supplied by the plaintiffs. For whatever may be the general law as to ownership of chattels in the progress of construction, the builders of the boat, under the circumstances of this case, had no claim to any property in her, consequently she must have belonged entirely to the defendants, as each plank and material was added in building, it became their property. *Long on Sales*, 288. Suppose a vessel should need repairs in sundry particulars, and the owners should agree, among themselves, that each one at his own cost should make a particular repair, and materials should be furnished one part owner to make the repairs he had undertaken to do, would such an agreement prevent the person furnishing the materials for the repairs from resorting to all the joint owners for the price of the materials furnished? There is no doubt that by a special contract the liability for repairs may be restricted to a particular owner, but it devolves on the owners to show this, for as by law they are all liable they must show the facts which would exonerate any one of them. There is nothing in the evidence establishing the fact that it was agreed that Osborne, one of the defendants, should build a particular part of the boat, and if there was, we can find no principle of law which, even in the event of such contract,

*Powell vs. Matthews.*

would restrict an individual furnishing one part owner's materials for building his part, to a recourse against that part owner alone, unless it was so agreed between the part owner and him who furnished the materials, or it could be showed that the credit was given exclusively to that part owner to whom the materials were supplied, and not to any of the others.

These considerations show that the Court did not err in refusing the last instruction asked by the defendants, for there was nothing in the evidence which showed that the plaintiffs intended only to give credit to Osborne, and even if the contract among the part owners, supposed by the instruction, did exist, there is no evidence that it was in any wise known to the plaintiffs.

It is obvious, from what has been previously said, that there was no error in refusing the first instruction asked by the defendants, and the third instruction may be considered in connexion with the first, and is objectionable in requiring the Court to tell the jury that Osborne should have been authorized by the other part owners before he could bind them for the materials obtained by him.

No injury was sustained by the defendants in refusing their second instruction, which related to the execution of the note by Osborne. It may have contained a correct legal proposition, about which no opinion is given, but inasmuch as it appeared from the evidence of the plaintiffs that there was but one cause of action, and that the consideration of the note described in the first count of the declaration, was the price of the materials set out in the bill of particulars, and as the verdict was for the price only of those materials with interest, we cannot for this cause reverse the judgment, for although an instruction may be in conformity to law, yet if this Court can see that its rejection has produced no injury to the party asking it, a judgment will not therefore be reversed.

The other Judges concurring, the judgment will be affirmed.

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POWELL vs. MATTHEWS.

A. being indebted to B. and others, received goods of B. to be sold under an agreement to account for, and make returns of, the sales. A. failed to state a large sale for cash made by him.

Held—

That if such failure were with the intent to defraud his creditors, it would sustain an allegation that "he had fraudulently concealed," &c., his property.

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*Powell vs. Matthews.*

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## APPEAL from St. Louis Circuit Court.

NAPTON, J., *delivered the opinion of the Court.*

This was a suit commenced by attachment. The affidavit upon which the attachment was issued, alleges an indebtedness to the plaintiff Powell, to the amount of \$774 39 for goods sold, &c., and that the plaintiff had good reason to believe, and did believe, that defendant had fraudulently conveyed, assigned, removed, concealed and disposed of his property and effects so as to hinder, defraud and delay his creditors, and that the defendant *was about to do* these things. The defendant filed his plea in abatement, denying the fraud. A trial was had, which resulted in favor of the plaintiff. This verdict was, upon application, set aside by the court, and after a mistrial, a second verdict was ultimately found for the defendant, upon which judgment was entered.

It appeared that Matthews, who lived in St. Louis, being indebted to the plaintiff, and also to the mercantile house of Kimm, Tewes & Harves, was permitted to take a certain amount of goods, under a written agreement to make a weekly account of his sales, and pay over the proceeds, after deducting certain charges. On the 27th January, 1844, Matthews sold to one Huber, goods amounting in value to \$240 30, for which he received payment in cash; but in his account furnished to the plaintiff of the sales of that day he only specified sales to the amount of \$22 60. The plaintiff thereupon took out this attachment:

Upon the trial the Court instructed the jury—

1. That although the jury shall believe that the defendant failed to keep his contract given in evidence, that fact is not sufficient to prove that the defendant before or at the time of this attachment had assigned, conveyed, or disposed of, or concealed his property, or was about to do so.

2. Unless the jury believe from the evidence that the defendant had, prior to the issue of the attachment, made a fraudulent conveyance of his property with the intent to hinder, delay and defraud his creditors, or that he was about to do so, they must find for the defendant.

3. The sale to Huber cannot be called a fraudulent disposition of the property of the defendant, unless the jury believe that said sale was made with a fraudulent intent, for the purpose of hindering, &c.

4. The neglect of defendant, to make a correct return, and to pay over the proceeds of sale to plaintiff or for his benefit, was only a breach



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of the defendant's contract, but such breach was not in itself a fraud as is contemplated by the attachment law.

5. Under the issue joined, unless the jury believe from the evidence, either,

1st. That the defendant had at the time of issuing the writ fraudulently conveyed, assigned, removed or concealed his property or effects so as to hinder, delay, &c., his creditors; or

2nd. That he was at that time about to do so, they must find for the defendant.

6. The failure on the part of defendant to perform the agreements read in evidence is no greater evidence of the facts charged in the affidavit, than would have been his failure to perform a parol or verbal agreement.

7. The concealment contemplated by the statute on the subject of attachment, means *secreting goods*, and not concealment of circumstances, or misrepresentation of facts, and this last mentioned conduct is no ground for issuing an attachment.

8. The point in controversy is not whether the plaintiff had reason for suspicion against the defendant, or reason to believe that he was acting improperly, but whether in fact the defendant was guilty of the facts charged in the affidavit. If he was not thus guilty in the opinion of the jury from the evidence, they must find for the defendant.

At the instance of the plaintiff the Court instructed the jury—

I. That if they believed from the evidence that at the time of issuing the attachment in this case, the defendant, Matthews, had fraudulently concealed his property, &c., with intent to hinder, defraud, &c., or

II. If he had fraudulently disposed of his property, &c., so as to hinder, delay, &c., or

III. If he was about to do these things, he was liable.

A fourth instruction was asked but refused by the Court, and was as follows: "If the jury shall believe from evidence that the defendant concealed the sale to Huber on the 27th January, 1844, from the plaintiff, with a view to defraud, hinder or delay his creditors, the plaintiff is entitled to a verdict."

A motion for a new trial was made by the plaintiff, but was overruled. A bill of exceptions was taken, preserving the testimony, and the instructions, and the case brought here by appeal.

The whole case turns entirely upon the instructions, which have therefore been copied in detail. The first one given by the Court at the instance of the defendant is correct. The mere failure of Matthews to

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perform his contract was certainly not a fraudulent concealment, or disposition of his property. His failure to return the sale made to Huber may have been accidental, or may have resulted from the best motives. The second instruction is not in all respects unobjectionable; it speaks of a fraudulent *conveyance* of property, with intent to hinder or delay creditors, as the only circumstance which created such a fraud as authorized an attachment. The statute enumerates concealment, assignment, &c.; but the fifth instruction which is couched almost in the very language of the act, explains the law on this point so clearly, that the jury could not have been misled by the second. The third instruction lays down the law applicable to the sale made by Matthews to Huber correctly; but it is surprising that the instructions should have been accompanied with the fourth and seventh. The fourth instruction leaves the jury no alternative; they are informed that the sale to Huber, and the false return of the sales of that day to Powell, was *only* a breach of contract, and that a mere breach of contract *in itself*, was not sufficient to authorize an attachment. The last proposition is true, and is only a repetition of the first instruction, but the first clause assumes the very point in issue, viz: whether this breach of contract was not also accompanied with a fraudulent intent to hinder and delay creditors. The Court declares first, that a mere breach of contract is no ground for an attachment, and so far is right enough; and second, that the conduct of Matthews in his transaction with Huber was only a breach of contract. The inference is plain, that the attachment could not be maintained on the evidence, for no other testimony was offered except that relating to the concealment of the sale to Huber.

The seventh instruction explains more fully the views entertained by the Court. That instruction declares, that the concealment referred to in the statute, must be a concealment of goods, and not of facts and circumstances. This distinction we confess ourselves unable to appreciate. If Matthews had packed away in his cellar goods to the value of one thousand dollars, with a view to defraud his creditors and prevent them from collecting their debts, this is conceded to be a fraud within the meaning of the statute; but if he sells the same goods and puts the money in his pocket with the same intent of cheating his creditors by the operation, it is regarded as a mere concealment of circumstances we suppose, and therefore not such a concealment as is reached by the attachment law. The statute uses the phrase "*goods and effects.*" The money for which the goods were sold to Huber was as capable of being concealed as the goods were, and the concealment of the money

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is surely not less a fraud, because it was accompanied with a concealment and misrepresentation of facts and circumstances.

The three instructions which the Court gave for the plaintiff are merely repetitions of the fifth instruction given at the instance of the defendant. We are unable to perceive any reason why the fourth, which the plaintiff asked, was not also given. If that be not the law, it follows that though the jury believed a sale was made to Huber, on the 27th of January, of goods to a large amount, and that the defendant concealed this fact from the plaintiff for the express purpose of defrauding him, yet it did not authorize an attachment.

In short, the instructions given and those refused, taken together show that the Court took from the jury the question of fraudulent intent entirely, and that if the instructions were followed, a verdict could only be found one way. It seems to have been the opinion of the Court which tried the cause, that the only concealment intended by the statute regulating the issuing of attachments as a ground for the writ, was a concealment of goods, and that any number of fraudulent falsehoods told with an express design of cheating a man's creditors, would not justify the creditors in believing that such debtor intended to effect his apparent purposes. We do not so understand the statute, and Judge Scott concurring, the judgment will therefore be reversed, and the cause remanded.

## QUINNETT vs. WASHINGTON.

1. Where goods are illegally taken under a distress warrant for rent, and money is paid to have them restored, an action will lie to recover back the money.
2. In such action double damages are not recoverable.

## ERROR to St. Louis Court of Common Pleas.

## WOODRUFF &amp; FIELD, for Plaintiff in Error, insist:

1. That by the common law the plaintiff below was not entitled to recover single damages, because the payment was made upon process provided by law. 1 Leigh's *Nisi Prius* cases, 64, and cases cited.

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2. That by the statute the plaintiff below was not entitled to recover, under the evidence given in the case:—

1st. Because the section which gives the penalty, does not extend to the case of proceedings by warrant like the present, but in its terms applies only to a claim on execution. See Statutes of 1842-3, p. 247. §7, giving penalty only in case of proceedings "under foregoing provisions."

2nd. Because the remedy by that section is given only in case of *excess* of rent claimed and received. In the present case no excess of rent was proved or pretended.

3rd. Because the statute remedy is given only to the tenant proceeded against. In the case at bar, the proof is, that Ainsworth and Allen were the tenants, and against *them alone*, the warrant issued. As the statute is penal, and cannot be extended beyond its terms, and certainly not to the case of the plaintiff below who claimed to be a mere stranger to the proceedings.

On the two general grounds mentioned above, the instruction asked by the defendant below rests, and if they are sustained the instruction was improperly refused.

3. The account filed with the Justice is to be regarded as a declaration in two counts—the one at common law, the other under the statute. As the verdict was general, the Court committed plain error in giving judgment for double damages. *Lowe & Forsythe vs. Harryman*, 8 Mo. Rep. 352.

**PRIMM & TAYLOR, for Defendant in Error, insist:**

1. That the defendant in error was the tenant of the plaintiff in error, at the time the levy was made under the warrant, and if this proposition is true, then this action is well brought. Session acts of 1842 and 1843, title Landlords, p. 247, §7.

2. That the defendant in error was such tenant is beyond doubt, as the evidence shows that fact, and the finding of the jury sanctions the same.

3. The instruction asked for by plaintiff in error, although good law, was properly refused, as it was declaratory of an abstract principle of law, that the evidence did not warrant, and was not sufficiently broad in its terms. 1 Leigh's *Nisi Prius* 64. 6 Mo. Rep. 6.

4. The whole statute is to be taken in *pari materia*, and the first, seventh and ninth sections of said act construed in that sense, gives the defendant in error, this action.

5. The ninth section contemplates that the warrant shall issue to an officer commanding him to "distrain for rent any property subject to lien for rent," and not against the person, and does not even require that the tenant shall be summoned to appear before the Justice; so that if the defendant in error was in fact the tenant, and an excess of rent was collected by virtue of the provisions of said law, then the judgment is correct—the whole proceeding being *in rem* and not *in personam*.

6. The finding of the jury is in accordance with the facts, and the Court did not err in doubling the damages, for the statute expressly gives to the plaintiff double damages, and the Court was charged with that duty. 1 Mo. Rep. 201.; 4 Mo. Rep. 564.

7. The Court did not err in overruling the motion in arrest of judgment, for the defect, if any, is cured by the statute. Rev. Code 1845, 8th and 9th divisions of section seven, and section eight.

8. That admitting for the argument, that the statute contemplates a case different from the one made out by the defendant in error, and that money obtained by compulsion of legal process, i. e. judgment in a court of justice cannot in general be recovered back, yet there must be *bona fides* on the part of the person receiving the money, which was not the case here, and in the absence of such good faith the action will lie, and if so, and the defendant in error has recovered too much damages, this Court will enter up a *remititur*. As to the action being maintained, see 1 Leigh's *Nisi Prius*, p. 64, and the authorities cited. As to the *remititur*, see Rev. Co. 468-9, and 4 Mo. Rep. 423.

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*Quinnett vs. Washington.*

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SCOTT, J., *delivered the opinion of the Court.*

This was a proceeding under the act of Assembly entitled, "An Act concerning landlords and tenants in St. Louis county," approved Feb'y 25th, 1843. Session Acts 247. Under the 9th section of this act a distress warrant was sued out by Quinette against Rensler Ainsworth and Jediah Allen, to recover the sum of \$563 due for rent. The officer was directed by Quinnett out of the goods of Washington, who was alleged to be a sub-tenant of Ainsworth & Allen, to make the sum of \$32 90, which was said to be the amount due by Washington as sub-tenant. His goods were accordingly distrained, and he paid the sum of \$32 90 to regain possession of them. Washington denied that he was sub-tenant of Ainsworth & Allen, but claimed to hold the premises he occupied as tenant of Quinnett for the rent of \$12 per month payable in advance, and produced receipts from Quinnett witnessing the contract.

Under these circumstances, Washington sued Quinnett in a Justices' court for the sum paid, to have his goods restored. The case was afterwards taken by appeal to the St. Louis Court of Common Pleas, where on a trial Washington recovered the sum of \$36 20, which was doubled by the Court, and judgment entered accordingly. Afterwards Washington entered a *remittitur* for the sum of twenty-five dollars.

On the trial the Court instructed the jury, that "if they find from the evidence that the plaintiff was an under tenant of Ainsworth & Allen, they will find for the defendant;" and refused to give this instruction at the instance of the defendant, "if the jury find that the money paid by the plaintiff was paid upon a claim made by the defendant, and was enforced by the defendant by means of a distress warrant at the time of the payment, then the plaintiff cannot recover even although the money paid was not in fact due."

It is very clear that the Court in entering judgment had no authority to double the sum found by the jury to be due to the plaintiff. It is the 7th section of the act above recited which gives double the amount of the excess of rent claimed by a landlord; but is only given in the case provided for in the "foregoing provisions" of the act, that is in the six sections preceding the 7th. The proceedings in this case are under the 9th section, and were wholly independent of the influence of the 7th. The *remittitur* does not help the matter, as it was not for an amount equal to that by which the judgment was increased by the Court in doubling the sum found due by the jury.



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We are of opinion that the Court properly refused the instruction asked by the defendant. This case is not within the principle stated, that money obtained by the compulsion of legal process is not recoverable back, although it be afterwards discovered that it was not due. The words "legal process" here used, mean judgments obtained in a Court of justice; and the principle above stated has only been asserted in cases where an action was brought to recover back money found not to be due, which had been previously recovered by judgment. *Marriott vs. Hampton*, 7 D. & E. 269. *Milner vs. Duncan*, 13 E. C. L. Rep. 293. *Cadaval vs. Collins*, 31 E. C. L. Rep. 206. A voluntary payment of an illegal demand to redeem goods, may be the subject of an action for money had and received. So if a person has property in his possession belonging to another and refuses to deliver it until money is paid, to which he has no right, and money is accordingly paid, it may be recovered. *Shaw and others vs. Woodcock*, 14 E. C. L. Reps. 14. So where a revenue officer seized goods as forfeited, which were not liable to seizure, and took money from the owner to release them, the latter recovered it back. *Irving vs. Watson*, 4 D. & E. 480—486. This is not like the case mentioned by some of the judges, of suit being brought in good faith by a plaintiff for a sum of money, believing that he is entitled to it, and the defendant in order to get rid of the suit, pays money which it turns out afterwards was not due. The goods of the defendant were wrongfully taken, for the jury has found that he was not a sub-tenant, and he was compelled, under pretence of law, to pay money in order to have them restored, and to hold that an action would not lie to recover it back would be a scandal to the law.

Judge NAPTON concurring, the judgment is reversed, and the cause remanded.

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BROWN vs. KING & FISHER.

1. The record of a former recovery apparently for the same cause of action, is *prima facie* evidence only that the cause had been once tried—and may be repelled by evidence shewing that the ground of the subsequent action is separate and distinct from the demand made on the former trial, and arose out of a separate transaction. A recovery for bacon sold in September, is no bar to a suit for bacon sold in August.

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*Brown vs. King & Fisher.*

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### APPEAL from St. Louis Circuit Court.

#### THOMAS for the Appellant.

1. An account for goods sold is an entire demand incapable of being split up into several suits: and if suit is brought for part, it bars another for the residue: *Nemo vexari debet bis pro eadem causa*. Guernsey vs. Carver, 8 Wend. 492. Miller vs. Covert, 1. Wend. 487. Smith vs. Jones, 15 Johns. Rep. 229. Farrington et. al. vs. Payne, 15 Johns. Rep. 432. Willard vs. Sperry, 16 Johns. Rep. 121. Phillips vs. Berich, 16 Johns. Rep. 136. Brockway vs. Kinney, 2 Johns. Rep. 210. Platner vs. Best, 11 Johns. Rep. 530. Ingraham vs. Hall, 11 Serg. & Rawle 78. Burmel vs. Pinto, 2 Conn. Rep. 431. Lane vs. Cook, 3 Day's Rep. 255. Lord Bagot vs. Williams, 3 Barn & Cress, 235. (10 Eng. Com. Law. Rep. 62.) Even an award is binding upon the parties against all causes of action existing prior to the submission. Newland vs. Douglass, 2 Johns. Rep. 62. Barlow vs. Todd, 3 Johns. Rep. 366. 2 Wils. 148. DeLong vs. Stanton, 9 Johns. Rep. 42. Wheeler vs. Van Houton, 12 Johns. Rep. 311. How much more so ought a judgment rendered by a Court of competent jurisdiction to be a bar against all claims or causes of action existing at the time, and which might have been included in the judgment—especially when it is shown, as in this case that the judgment offered in evidence was upon a claim or demand indivisible in its nature, between the same parties, and that the present suit is for a *part* of that entire and indivisible demand. A judgment and satisfaction of a Court having competent jurisdiction, bars a recovery for any cause of action that might have been included in that judgment, and such judgment can either be pleaded by way of *estoppel* or given in evidence under the general issue.

2. The Court below erred in allowing appelles to introduce other testimony after they had closed their case, and after appellant has testified—appellees being summoned as witnesses to testify on the part of appellant, but they refusing to be sworn.

3. The Court below erred in refusing the instructions asked for by appellant's counsel.

4. The Court below erred in refusing to grant a new trial, because the verdict was against evidence, and whenever the jury have clearly erred, and the Court refuses a new trial, it is error. Clemens vs. Laveille & Morton, 4 Mo. Rep. 80. It is error where the evidence strongly and decidedly preponderates the verdict. 3 Mo. Rep. 464.; 6 Mo. Rep. 61.; 8 Mo. Rep. 518.

#### TODD for the Appellees.

1. The Court did not err in permitting Cammack & Durno to testify after Brown had testified. 7 Mc. Rep. p. 115.; 8 Mo. Rep. p. 26. The statute forbids it only to the party who calls upon his adversary, who upon such call does testify. Revised Code of 1845, p. 655, §25.

2. The Court did not err in refusing to give the instructions asked for by Brown.

Not in refusing the *first*, because the cause of action in this suit was complete in itself, and in no wise connected with, and is distinct from, and independent of, the cause of action in the former suit—and the instruction admits that it was not included in the former suit.

Not in refusing the second, because it is not the law, but the law is that when the pleadings in the former suit are so general that what was embraced in the former suit don't distinctly appear, and the cause of the present action might have been embraced in it, it will be presumed that it was, but even parol evidence is allowed to show the contrary. But when the former suit was special and particular in its pleadings as to the causes of action prosecuted, then it is a bar only to those in a future suit. Such is the character of the former suit offered in bar to this. Suppose a man had two notes at the same time due against the same man, and he should sue on one and

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recover—could this recovery be pleaded in bar to a future suit for the recovery of the other note? Besides, this item was not kept back by fraud, or for vexation, but by a mistake.

Nor did the Court err in refusing to give the third instruction. Upon this the appellees think no remarks required. The principle of the instruction, it is believed, was never urged in a Court of law.

3. Respecting the evidence, there being some on both sides, this Court will not disturb the verdict. 7th Mo. Reps. p. 220. 8th Mo. Reps. p. 431.

*NAPTON, J., delivered the opinion of the Court.*

The present action was brought before a Justice of the Peace in October, 1844, and the following account was filed as the cause of action:—

M. W. BROWN		Dr.
To	King & Fisher,	
Aug. 24, 1843,	1555 lbs. spoiled Bacon, 1-2c.....	\$7 77
	1056 lbs. do do 1-2c.....	5 28
		<hr/> \$13 05

The plaintiffs, King & Fisher, obtained a judgment before the Justice, and an appeal being taken, the case was tried in the Circuit Court and a judgment was also there had for them, from which the defendant Brown, has appealed to this Court. On the trial in the Circuit Court the account was proved by the clerk of King & Fisher. The defendant then gave in evidence a transcript of a judgment rendered before a Justice of the Peace, December 5, 1843, on a demand stated as follows:—

M. W. BROWN		Dr.
1843.	To King & Fisher,	
Aug. 9.	For 2080 lbs. spoiled Bacon, 1-2c.....	\$10 40
Sept. 11.	2613 lbs. do do .....	13 06
		<hr/> \$23 46

The defendant then introduced a witness, who testified, that he was in Brown's employment during the years 1842 and 1843—that Brown was a soap boiler—that witness purchased the grease, ashes, &c., used in the manufactory,—that he bought for Brown, from the plaintiffs, spoiled bacon several times—August 4th, 9th and 24th, 1843, and perhaps in June and July of the same year—that he never bought any after August 24, 1843, and was confident that Brown never bought any on the 11th Sept. 1843, because it was his business to make these purchases, &c.

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The plaintiffs having been subpoenaed to testify, and failing to appear, the defendant himself testified that he did not owe the demand sued for,—that he had paid it under a different date, to-wit: Sept. 11, 1843—that when the demand sued on before Justice McKenny was presented to him, he did not discover that the date of the last item was incorrect, and when he was sued thereon, he immediately went forward and confessed it—that he personally never purchased spoiled bacon from King & Fisher, but his man Usinger, (who had been examined as a witness,) made several—that none were made after August, 1843.

The plaintiffs then recalled their first witness, to which objection was made, but overruled. This witness stated that he made the sales of bacon, and remembered distinctly selling the bacon charged in the bill sued on, to Usinger for Brown—he directed the clerk who made the entries of sale to charge the same to Brown—this was done on the day of sale—could not recollect the precise number of sales unless by referring to the book of entries. On being shown this book, he pointed out various entries, as follows:—

August 4th, 1843—3061 lbs.....\$16 21 paid.

“ 9th, 1843—2880 lbs..... 10 40

“ 24th, 1843—2611 lbs..... 13 05 paid.

Sept. 11th, 1843—2613 lbs..... 13 06

The above was sold to Brown, and entries made by witness's direction. The first quantity was sold to Brown in person, and paid for at the time. On cross examination, he was asked if there had been an alteration in the number of pounds charged Sept. 11, 1843, from 2611 to 2613—he replied he thought not, because, if so, there must also be an alteration in the carrying out of the sale—that at the time of the sale he did not know the first name of Brown, but the entries were made by the clerk under direction of witness.

The book-keeper of the plaintiffs was then examined—who testified, that when he came to post the books he found that the item of August 24, 1843, was charged to Brown—that owing to the ignorance of the salesman and clerk, this item was so charged in the day book that he posted this item to the debit of W. Brown, of Illinois, also a customer of plaintiffs—that some time after this the plaintiffs having presented said account to W. Brown, said Brown wrote to him denying having received any bacon on the 24th August, 1843—that on discovering his error, witness sent the account to defendant, who refused payment, although at the time of making said demand, said defendant produced to witness the identical bill which he had received with the bacon when he purchased it, and for

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which this suit is brought—but which defendant stated he had paid for by paying the bill dated the 11th September, 1843, and endeavored to convince witness of this by pointing out the similarity of the two bills in all but the date, there being a difference of but two pounds in the amount of bacon, and but one cent in the sum extended in each of them.

The defendant then asked the Court to declare the law to be:—

1st. That if it be established from the evidence that the present cause of action contained in the plaintiffs's account was due and might have been included in the suit before Justice McKenny, the plaintiffs cannot recover in this action.

2nd. That a judgment and satisfaction in a Court having competent jurisdiction, is a bar to a subsequent recovery for any cause of action that might have been included in the former action.

3rd. That if the present cause of action existed prior to the date of the suit before Justice McKenny, the record of which was given in evidence by defendant, and that the same might have been included in said suit, the cost in the present case ought to be adjudged against the plaintiffs.

But the Court refused so to declare the law, and the case being submitted to the judge without a jury, a verdict and judgment were had for the plaintiffs. The defendant excepted to the various opinions of the Court unfavorable to him, and has brought the case here by appeal.

The errors assigned are, the admission of testimony on the part of the plaintiffs after the defendant had testified,—the refusal of the instructions asked, and the refusal to grant a new trial.

Whatever doubts may have existed as to the construction of the act of 1835, which allows a party in a justice's court to call upon his adversary to testify, and in case of his refusal to testify himself, the provision on this subject in the revision of 1845 is explicit enough. The 25th Section of the 5th Article, which is the one allowing this privilege, declares, that if a party testifies under this provision after being called on to do so by his adversary, no other testimony shall be heard in the case, *on behalf of the party so calling on his adversary*. This restriction we understand to extend not only to cases where the party called on testifies, but also to a case like the present, where the party called upon by his refusal to testify puts it in the power of his adversary to testify for himself. In either event, the party choosing to rest his case upon the oath of his adversary, or upon his own oath, is not allowed to call in other witnesses.

This case was tried in November, 1845, in the Circuit Court, and



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consequently after the act regulating Justices' Courts in the Revision of 1845 had gone into operation. But had the Revision of 1835 been in force at the trial, we could not say that its provisions on this point must not have been restricted by implication to the same extent they have been in terms by the subsequent Revision of 1845.

The instructions or statements of the law supposed to be applicable to the facts, which the Circuit Court was called upon to give, were properly refused. A correct and concise exposition of the law applicable to this case, and to cases of a similar character, may be found in *Phillips vs. Berick*, 16 Johns. Reps. 138. In that case the Court held that, the record of a former recovery apparently for the same cause of action as that which is the foundation of a subsequent suit, is *prima facie* evidence only, that the demand had been once tried, and the plaintiffs may repel it by showing that it was a distinct demand in relation to which no testimony had been offered on the trial in the former cause, and that it arose out of a distinct and unconnected transaction. If the plaintiff will bring an action for a part only of an entire an indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit, as where the plaintiff brought several suits for three barrels of potash sold at the same time. *Smith vs. Jones*, 15 J. R. 229. But the instructions assume that a recovery by the plaintiff for 2613 lbs. of bacon sold and delivered on the 11th Sept. 1843, was a bar to any other claim for bacon sold before that time, although it might appear from the testimony that it was a distinct and disconnected transaction. Such an exposition of the law as the defendant desired, would have precluded all the testimony of the plaintiff, the object of which was to show that the sale of bacon on the 24th of August was not included in the recovery before Justice McKenny, and that its omission from the account then sued on, occurred through accident or mistake.

The only remaining point made by the appellant is, that the verdict was not warranted by the evidence. The rule which this Court has adopted in applications of this kind, has been so frequently stated as to render it superfluous to repeat it here. This was a case, as the statement of the evidence clearly shows, most suitable for the investigation of a jury, or as the parties preferred, of the Court which heard the witnesses. The testimony was exceedingly contradictory, and we cannot hope to find a verdict more satisfactory than the one found by the Circuit Court.

Judgment affirmed.

*Chouteau and others vs. Uhrig and others.*

CHOUTEAU AND OTHERS vs. UHRIG AND OTHERS.

1. In an action for the loss of a keel-boat alleged to have been sunk by the carelessness of defendants, an instruction "That defendants, or so many of them as were owners of the steamboat at the time of the hiring of the keel-boat, are liable, if the loss of the keel was occasioned by the omission of ordinary care on the part of the officers or hands employed on the steamboat," and requiring the jury to enquire whether there was such care—in running the boat in the night—after a storm arose, &c., does not assume facts properly to be found by a jury.
2. Where no evil results from an instruction, although strictly it may be improper, the judgment will not be reversed.

APPEAL from St. Louis Court of Common Pleas.

*SPALDING for Appellants.*

1. The instruction given for the plaintiff below was erroneous in the following particulars:—
  1. It defines the ordinary care which it requires to be, such as a prudent man exercises about "his own property," instead of saying such as a prudent commander of a boat exercises about his keel in towing the same.
  2. The Court in this instruction tells the jury that the Mermaid proceeded in the "night time," and leaves it to the jury to say whether it was a want of proper care to proceed with the keel in the "night time,"—thus assuming this fact, and taking it from the jury: whereas the testimony on this head was conflicting. One of the witnesses, Chas. F. Deane, says, it was "early in the morning," and that as they went on it was light.
  3. In this instruction the Court assumes the fact that, the plaintiffs were owners of the keel, and that they had hired the keel to the defendants, or bailed her in some way, and prohibits the jury from passing on this. As to the ownership of the keel, the only testimony was of Oscar Nicolas, who said, "that Andrew Uhrig, Joseph Uhrig, W. H. Hasterhagen, and John Schreiber, were owners of the Pearl, to which the Hornet belonged "in the fall of 1842," not stating at what time in the fall, nor whether during the whole of the fall. The Court says the defendants are liable in this action if the loss of the keel was occasioned by the want of care; although the jury from the evidence might not have been satisfied that plaintiffs were owners of the keel at the time, either from the vagueness of the testimony or from the appearance and demeanor of Oscar Nicolas.
  4. The same observations apply as to the assertion in the instruction that a storm arose. There is testimony tending to prove, and perhaps the Court might think fully proving the fact; but its existence should have been left to the jury to find from the testimony.
  5. The instruction is evidently erroneous in leaving it to the jury whether there was a want of care in omitting reasonable efforts to rescue the keel-boat after it had struck; thus assuming and so stating to the jury that defendants had omitted reasonable efforts to rescue the keel.
  6. The instruction then proceeds and says that "if the jury find that there was such want of care, and that the keel-boat was thereby destroyed, they will find for the plaintiffs." This part of the instruction takes all the rest of the case from the jury, and authorizes a recovery if they find the boat was lost for want of care, thus assuming that plaintiffs were owners of the keel, that

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*Chouteau and others vs. Uhrig and others.*


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defendants were owners of the Mermaid, that defendants personally or by agent had the keel and were bound to return here to plaintiffs on some contract, &c.

7. The instruction is wrong also in declaring the measure of damages.

II. The instructions offered by defendants and refused, are omitted; and this Court therefore cannot know whether there is error in that refusal, and this want of knowledge is not the act of the party or his counsel. This loss, therefore, ought not to prejudice the appellants. The Court below acted, but it is not in the power of man to show what its action was, by its own omission or rather its clerks.

III. The Court erred in not granting a new trial.

1. Because the testimony shows that there was no want of care, and therefore the verdict is against evidence. I refer to the Bill of Exceptions as showing a case of no unreasonable exposure of the keel, but merely using her in just such a way as was proper. A steamboat cannot stop at every puff of wind, or at the sight of every cloud. The facts being set forth, it is a matter of law whether there was due care, and the Court is called upon to say whether there was or not.

2. Because of the newly discovered evidence contained in the affidavits of Chouteau and Call.

### *FIELD for Appellees.*

I. There was no error in the instructions given to the jury.

The general proposition of law with which they set out is scrupulously correct.

The four particulars to which the jury were permitted to apply the general rule, are fairly disclosed in the evidence.

1. As to proceeding on the voyage in the night—see the following references to the testimony—Deane in Bill of Exceptions, p. 15, p. 17. Grapevine, p. 18. Parks. p. 23

2. As to the storm: Deane, p. 16. Grapevine, p. 18, p. 21 and p. 22. Parks. p. 23. Dodd, p. 24.

3. As to the place of landing. Deane, p. 17. Grapevine, p. 22. Parks. p. 23 and p. 24.

4. As to the efforts to rescue the keel: Parks. p. 24.

II. There was no error in refusing the second new trial.

1. For it is not pretended the jury erred in matter of law. See *Hill vs. Wilkins*, 4 Mo. Rep. 86. *Humbert vs. Eckert*, 7 Mo. Rep. 259.

2. The affidavits of newly discovered evidence are liable to these objections:—

A. No proper diligence is shown to get the evidence, the existence of which must have been known to the officers of the boat who made the contract with Blackmore.

B. The pretended evidence goes only to one point, (i. e. the efforts to save the keel-boat,) on which obviously the case did not turn, as the jury gave the whole value of the boat.

C. Even to that point the evidence of Call is more favorable to plaintiffs than to defendants, as he proves that he could have saved the boat if he had been employed at an earlier day.

### *NAPTON, J., delivered the opinion of the Court.*

This was an action of assumpsit brought by Uhrig and others as owners of the keel-boat *Hornet*, against Chouteau and others, owners of the steamboat *Mermaid*, to recover the value of the said keel-boat, alleged to have been lost through the negligence of the officers of the *Mermaid*. The keel-boat was hired to the Captain of the *Mermaid*, at the rate of \$2:50 per day, to be returned in good order at the option of either party. The keel-boat was snagged and sunk whilst the *Mermaid* was attempt-

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ing to land on the Illinois shore, just above the mouth of the Missouri.

The plaintiffs obtained a verdict, but the Court on motion of the defendants, set the same aside, and granted a new trial. The second trial resulted as the first, in a verdict for the plaintiffs for \$450, the full value of the keel. A motion was made for another trial, but it was overruled and the case brought here by appeal.

The Bill of Exceptions gives the evidence on the second trial in detail. The plaintiffs endeavored to show negligence in the officers of the *Mermaid*, in running after night, during a storm, and in attempting to land at an unsuitable place. The evidence on the other side was designed to show, that every proper and ordinary precaution was used to prevent loss, and that the loss in fact was occasioned by the elements or perils of the river, against which the contract did not insure the defendants.

The Court gave the following instruction at the request of the plaintiffs: "The defendants, or so many of them as were owners of the steamboat at the time of the hiring of the keel-boat, are liable in the present action, if the loss of the keel-boat was occasioned by the omission of *ordinary care* on the part of the officers or hands employed on the steamboat. And by ordinary care is meant, such care as a prudent man exercises about his own property.

The jury then will consider whether there was a want of such care in either of the following particulars:—

1st. In proceeding on the voyage, under the circumstances, in the night time.

2nd. In proceeding on the voyage after a storm arose.

3rd. In the selection of the place, or in the manner of bringing the steamboat to land.

4th. In omitting reasonable efforts to rescue the keel-boat after it had struck.

And if the jury find that there was such want of care, and that the keel-boat was thereby destroyed, they will find for the plaintiffs; and in either of the three first mentioned cases they will give the plaintiffs for damages the value of the keel-boat; and in the fourth case if they find for the plaintiffs on that alone, they will give as damages a sum equivalent to so much of the value of the keel-boat as might have been saved by such reasonable efforts to rescue it."

Instructions were asked by the defendants, but refused. They are not copied in the bill of exceptions.

The principal ground upon which the appellants ask a reversal of the

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judgment is the instruction which the Court gave to the jury. This instruction is objected to, as assuming the existence of material facts which should have been stated hypothetically. Running in the night time, and after a storm arose, and omitting reasonable efforts to rescue the keel, are supposed to be assumed as facts in the instruction. If this be the proper and fair construction of the Judge's language, and it was likely so to be understood by the jury, there can be no dispute of its impropriety. The instruction is not couched in the style usually adopted, and the objections taken to them now, at least, show the policy of adhering to the customary forms of proceeding in Courts, even at the risk of tiresome repetitions, yet we do not understand them as assuming the facts about which the jury were to enquire. For example, in the fourth particular to which the attention of the jury was called, they were directed to enquire whether there was any negligence in omitting reasonable efforts to rescue the keel-boat after it had struck. This surely did not mean to assert that reasonable efforts *were* omitted, for if so, there was nothing for the jury to enquire about, as the omission of such efforts would be of itself gross negligence. So where in the first proposition the enquiry is, whether there was a want of reasonable care in proceeding on the voyage in the night time, it is not meant to assert that the voyage was prosecuted in the night time, but as there was testimony on this head, the jury were left to enquire into the fact, and to ascertain, if they found it existed, whether it amounted to negligence. The same may be said in relation to the other propositions. The charge is more special than is usual in our practice, but we know of no law which could be construed as prohibiting such instructions.

It has also been objected to this charge of the Court, that it assumes the existence of a contract between the owners of the steamboat and the owners of the keel, and takes for granted that the plaintiffs had been proved to be the owners of the one, and the defendants of the other. The language of the instruction is: "The defendants, or so many of them as were owners of the steamboat at the time of the hiring of the keel-boat, are liable," &c. This does not assume that the defendants were owners, but tells the jury that the defendants, provided they are the owners, or so many of them as may be proved to be the owners, are liable in certain contingencies specified. The instruction, it is true, does assume that there was a contract between the parties, and therein is erroneous, but as was observed in the case of *Thompson vs. Botts*, (8 M. R.) we are not inclined to reverse a judgment for so trivial an oversight, where it is apparent it could have produced no harm. Such inad-



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vertencies will occur even with the most diligent, and the administration of justice would be exceedingly perplexing and expensive if their occurrence should be permitted to undo the deliberate judgments of our Courts, in cases where it was manifest that the same result must ensue upon a correction of the error.

The newly discovered evidence of J. W. Call, relates to a point upon which the case did not turn. The verdict of the jury was for the full value of the boat, manifesting thereby the opinion that the keel had been lost through the mismanagement or carelessness of the defendants. Call's testimony relates entirely to the efforts to raise the keel, and does not seem to have any material bearing upon the merits of the case.

After two verdicts in favor of the plaintiffs, in a case peculiarly suited to the investigation of a jury conversant with the usages of the steam-boat trade, the interference of this Court upon a mere question of preponderating testimony could scarcely be expected. The judgment will therefore be affirmed;—Judge Scott concurring.

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HEISTERHAGEN vs. GARLAND.

1. It is not a sufficient ground to reverse the judgment of an inferior Court refusing to set aside a judgment by default, that the affidavit for such motion states a good defence, and that "defendant was a German by birth, and could not understand the English language unless explained to him, and that he did not understand when the sheriff served the writ upon him that he had to appear in Court:" it appearing that "he refused to hear the writ read to him"—and he knew he was sued.
2. The omission to pay the jury fee before judgment entered, is no ground for setting aside the judgment.

## APPEAL from St. Louis Court of Common Pleas.

PRIMM & TAYLOR, *for Appellant, insist:*

1. The Court erred in not setting the judgment by default aside, for the defendant not only showed that he had a meritorious defence, as he was advised by counsel and believed, but that in fact and in truth, the note with legal interest had been fully paid, and showed the good cause contemplated by the statute, for he immediately set about procuring the judgment to be set aside as soon as he knew that he was sued.

2. By the Common Law it is in the discretion of the Court to set aside a judgment by default on affidavit of merits, so that a term is not lost to the plaintiff. Tidd's Pract. 507, 508. Gra-

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ham's Pract. 634. And in this case no injustice could have been done the plaintiff, for the Court could in its discretion prescribe the terms and order issuable pleas to be filed *instantly*, and a trial at the same term the judgment was rendered.

The present case shows no knowledge whatever of the appellant being sued—a meritorious defence—and immediate measures taken to perfect his defence.

3. The judgment is irregular, because the jury fee should have been paid before judgment taken. Rev. Co. Appendix, p. 1100, §6. Some analogy may be drawn from the English Stamp Acts; there the want of a Stamp excludes the proposed evidence, so here the record no where shows the law to be complied with.

*POLK, for Appellee, insists:*

1. The affidavit ought not only to have shown a meritorious defence, but also stated the evidence to sustain that defence. Barry vs. Johnson, 3 M. R. 263. The affidavit in this case gives no statement of the evidence upon which the appellee could rely to sustain his defence. It merely states in what his defence consists.

2. The affidavit does not show "the exercise of all due diligence by the appellant in making his defence," which is requisite in order to justify the Court in setting aside the judgment by default. Green vs. Goodloe, 7 M. R. 25. Wimer vs. Morris, 7 M. R. 6. LeCompte vs. Wash, 4 Mo. Rep. 557.

3. The affidavit does not show such a defence as would be sufficient to bar the recovery of the appellee. 7 Mo. Reps. 25.

4. The Bill of Exceptions contains no evidence in regard to the payment of the jury fee—therefore, as the Bill of Exceptions does not show that it was not paid, if it was necessary that it should have been paid before the Court could have legally rendered the judgment by default, this Court will presume it was paid. In support of this position, I refer the Court to the numerous cases decided by this Court, in which they have affirmed the judgments of the inferior Courts, because the Bills of Exceptions did not state that all the evidence was embodied therein, and to the reasoning of the Court upon which such cases were decided.

But the statute does not require a jury fee to be paid by plaintiff in cases of judgment by default upon written instruments—but only in cases of trial. See Code of 1845, Appendix p. 1100, §6. In this case there was no trial of facts by either Court or jury, but a mere computation by the Clerk, according to §41 of p. 815 of Code of 1845.

*Statement of the case adopted by the Court, and opinion by NAPTON, J.*

This was a suit by petition in debt, brought by appellee in the St. Louis Court of Common Pleas, to the September Term, 1845, against Heinrich Koch and Henry W. Heisterhagen, on a note executed by them, dated at St. Louis, 4th June, 1839, payable seven months after date to the order of William Palm, at the Bank of the State of Missouri, for three hundred and thirty-five dollars, without offset or defalcation for value received, which note was endorsed and delivered by the payee Palm, to the appellee. Both Koch and Heisterhagen were personally served with process. At the return term of the writ, and after the time for pleading fixed by statute had expired, judgment by default was duly entered up against said Koch and Heisterhagen for want of a plea.

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Afterwards, on the 5th of November, 1845, said appellant, Heisterhagen, moved the Court to set aside the judgment by default entered against him, for the reasons embodied in his affidavit accompanying said motion, and also because the jury fee in the case had not been paid. This motion was overruled by the Court, and said appellant excepted and appealed to this Court. The Bill of Exceptions sets out the affidavit—which states that he executed the note on which he was sued as security for said Koch, of which Palm, the payee, was at that time cognizant, which was some four or five years ago. That he called on the plaintiff some two years before, and directed him to sue said Koch, and that unless plaintiff would do so, he would not regard himself any longer responsible on the note. That appellee never instituted suit on said note, until this suit was brought. That the consideration of the note was usurious, and that affiant had been informed, and believed that the plaintiff had received the larger portion of the note from said Koch. That affiant was a German by birth, speaking little English, and unable to understand the English language when spoken to, although he knew the meaning of words in English when explained fully to him. That at the time the writ in this suit was served on the affiant, he did not know he must appear in Court, and was first informed of the fact that he had been sued, by the Sheriff calling on him with an execution a few days before. That he called on counsel and stated his case, and immediately took measures to have the judgment set aside. That he had been informed by counsel and believed that he had a good defence to the action. That since the fact of his being sued was brought to his knowledge, he had used all diligence. That if he had understood what the Sheriff meant when he first came to him, he would have defended the suit, because he had attorneys constantly employed to attend to his business.

The Bill of Exceptions, however, does not show that the jury fee in the case was not paid.

The only question in this case is, whether the affidavit of defendant makes out a case of due diligence. The affidavit asserts a meritorious defence, and states the particulars of that defence. There is nothing to distinguish this case from that of *Green vs. Goodloe*, (7 Mo. Reps. 25,) except that the defendant here was a German, and according to his affidavit was unable to understand the English language, unless particularly explained to him, and at the time the writ was served, he did not understand he was to appear in Court. The return of the Sheriff upon the writ issued in this case was as follows: "Executed the within writ, in, &c., on, &c., by offering to read it and the annexed petition to Hein-

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rich Koch and Henry W. Heisterhagen, the defendants, *which they each refused to hear.*" Our statute has declared, that the offer by an officer to read a writ where the party to be served refuses to hear it, shall be a valid service. It will be observed that the affidavit of Heisterhagen does not contradict the Sheriff's return, nor does the affiant leave it to be inferred that he did not understand the general character of the business which the Sheriff desired to communicate to him, to-wit: that he was sued, and by whom he was sued, but merely states, that he did not understand that he was to appear in Court at a specified time. Would it not virtually abrogate the implied service which the statute sanctions, to permit so ambiguous an affidavit as this to set it aside? We would not be understood to say, that a case of such gross ignorance, or imposition, might not be made out as to show there was a necessity or propriety in the interference of the Court. But the affidavit in this case does not preclude the supposition, that the defendant was sufficiently advised by the communication of the officer that he was sued, and if so, that he could have informed himself of the particulars of the writ, if he had desired it. He was aware of his security-ship, and indeed had urged a suit, as he states in his affidavit; and moreover, seems not to have been wholly ignorant of litigation, inasmuch as he states in his affidavit, that he "had attorneys constantly employed to attend to his business."

Upon the whole, then, we are not disposed to interfere with the decision of the Court of Common Pleas. Had that Court thought proper to set the judgment aside, we cannot say such a course would have been erroneous; but it must be a clear case to authorize our interference.

We perceive no force in the point made in relation to the jury fee; whether it was paid or not, did not concern the defendant.

**Judgment affirmed.**

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DOANE, WarBURTON & KING vs. NEWMAN.

A promise by A. to pay a freight bill given to B., and by B. transferred to C. in consideration that C. would incur a liability for B., is upon a sufficient consideration, and need not be in writing.

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### APPEAL from St. Louis Court of Common Pleas.

#### SPALDING, for the Appellants, insists :

1. The instructions given for the plaintiff below were erroneous as they lay down the proposition, that an act of one party is a good consideration for the promise of another, although the promise was not made with any reference to such act. This instruction does not require that defendants should have made their promise, in consideration that Newman would go security for O'Farrel. It is a past consideration. Powell on Contracts, 209—10—11.

2. The error in those instructions is not aided by the instructions subsequently given.

3. The fourth instruction for defendants was improperly refused. Warburton & King are charged as having assumed to pay the liability of O'Farrel, which is required to be in writing in order to be binding.

4. The verdict was against evidence and the weight of evidence.

1st. The whole testimony as to the promise of the defendants to pay the freight bill to plaintiff is in O'Farrel's deposition.

2nd. The most favorable view for appellee of that testimony is, that it leaves the matter entirely in the dark, whether the promise was made in consideration that Newman would go security or not.

3rd. And in this case where the witness was not personally present, this Court can as well judge of the weight of testimony as the jury, especially as there is only one witness, and the only question is, *what he says*, taking his whole statement together.

4th. His first statement in the narrative part of the deposition makes the promise of defendants below subsequent to Newman's giving the security.

5th. And the only instance where he intimates anything to the contrary is, in answer to a leading question informing the witness what he was desired and expected to state.

6th. The witness was brought to St. Louis at Newman's expense, and boarded by him, and shows otherwise in his deposition a manifest bias in favor of Newman, who had also forgiven him his claim on him for the security debt.

The result of his statement is, that he asserts both ways, under such circumstances that more confidence is to be reposed in his first assertion, which came out without prompting or solicitation than in the other. He first states in the narrative part of the deposition, that the defendants promised to pay the freight to Newman, and they made that promise because he, O'Farrel, pressed them to do so, as Newman "*had become security for deponent*," &c. Afterwards, the counsel put a leading question, to which he replies hesitatingly, showing that he scarcely dared to say it, *that he should say*, "that Newman did become security in consequence of the understanding with defendants to pay," &c.

On this state of facts, the appellant contends that the jury had no better opportunity of judging of the weight or meaning of the testimony than the Court, as to this point. It was all in writing, and the witness was not present. The burden was on the plaintiff to prove that Warburton and King, in consideration that, *he, Newman, would become security for O'Farrel*, promised to pay the freight bill to Newman. Unless this were proved, there was no consideration for the promise, and the plaintiff was bound to prove this, as the burden was on him to prove the contract to be binding in law, which it would not have been without a proper consideration. If Newman had gone security for O'Farrel on the Attachment Bond, without the privity of Warburton & King, and then had gone with O'Farrel to Warburton & King and they had promised to pay the freight bill to him, it would have been entirely without consideration, for the freight bill would be due to O'Farrel; the bill of lading had been signed, so that the contract for carrying the goods was complete, and the agreement to pay the freight therefor is in writing, and appears on the face of



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the bill of lading, and as soon as earned, it would have been due to O'Farrel. His order in favor of Newman could not transfer it so as to be suable in Newman's name, unless it be a bill of exchange, and had been accepted by Warburton & King. If it were a bill of exchange, it had not been accepted, because our Act of Assembly (see Rev. Code of 1835, page 97,) requires an acceptance to be in writing. The whole question, therefore, turns on the consideration of the promise.

Powell on Contracts, says, page 209, "If a consideration is executed, and does not go along with the contract, but is entirely past, and the contract is merely subsequent, it is not a sufficient consideration," as "where a master has promised two men, that in consideration they had bailed his servant out of prison, he would save them harmless, it was held that this did not bind him."

If, however, there be a duty or moral obligation before, a promise on a past or executed consideration will bind. Powell on Contracts, 211; as a promise to pay a debt barred by the statute of limitations.

And a consideration *past*, will be sufficient to maintain an action on a *subsequent* promise, where the consideration is alleged to have been at the *defendant's request*. Powell, 211—212.

In the present case the Court instructed, that a consideration was sufficient, *when made without any consideration*, if the promisee on the faith of the promise, incurs expense or enters into a liability; that is, I promise to give a man a hundred dollars; on the faith of this he buys a suit of clothes, and not paying, is sued and compelled to pay; he then turns round and sues me for the \$100, and alleges that it is a binding promise, for the consideration of his having suffered by means of my promise; when his purchasing the clothes was without my request or even my knowledge.

CROCKETT & BRIGGS *for Appellees.*

NAPTON, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought by Jonas Newman, against John Warburton, Hezekiah King, Wyllys King and Job P. Doane, composing the mercantile firm of Warburton & King. The first count in the declaration averred, that the defendants contracted with one William J. O'Farrel, master and owner of the steamboat Constellation, that if he would convey certain merchandize from St. Louis to New Orleans, safely and securely, and there deliver the same to them, they would pay him as freight therefore the sum of \$545 95 at the city of St. Louis,—that said steamboat having been arrested at St. Louis—O'Farrel agreed with the plaintiff Newman, that if he would become security and release said boat from arrest, he said O'Farrel would give his order on the defendants for the amount of said freight, and that he should receive and hold the same as collateral security—that the defendants had notice of this arrangement, and agreed to pay said freight over to Newman, in consideration of which promise of the defendants, he, Newman, became security for the boat, received from O'Farrel an order for said freight on defendants, who then promised to pay the freight to him as soon as it should have been earned by the delivery of the goods at New Orleans,

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according to the bill of lading. It is further averred, that the freight was earned, and that demand was made on the defendants for it, and they refused to pay. The second count of the declaration is framed on the order, alleging they had promised to pay it, &c., and the third count is on account stated. The plea was non assumpsit, and a trial was had, which resulted in a verdict and judgment for Newman, from which the defendants appealed.

Upon the trial the plaintiff gave in evidence the bill of lading, dated 8th April, 1841, stating the goods shipped by Warburton & King to be delivered at New Orleans unto Charles Doane, or his assigns, the shippers paying freight at the rate of twenty cents per 100 lbs., &c., all payable on return of the boat to St. Louis, or return of bill of lading duly receipted by consignee. At the foot of the bill of lading was the following memorandum: "Received from steamer Constellation the property specified in the above bill of lading, and have drawn on shippers in favor of R. W. Wood, Clerk of the Constellation, for \$504, under this date. No. 128—say barrel pork (in dispute) not delivered, and one pig lead short. New Orleans, April 23, 1841. CHARLES DOANE."

The plaintiff also gave in evidence the record of a suit in the said Court of Common Pleas in favor of Daniel Murphy, against William J. O'Farrel, commenced on the 7th April, 1841, by attachment, which was levied on the Constellation on the 8th, and was released by O'Farrel giving bond with Jonas Newman as security on the 9th of the same month; judgment was finally entered in this case against O'Farrel and Newman on their bond, for the amount of which, \$660 90, an execution issued on the 2nd May, 1842, which was returned satisfied by Newman by the Sheriff.

The principal witness in favor of the plaintiff was O'Farrel, whose deposition had been taken. The contract between O'Farrel and Warburton & King, in relation to the freight, was proved by him, about as stated in the declaration; and after that contract was made and the attachment levied on the boat, he (witness) applied to Newman and requested him to go his security, which he agreed to do, provided he would give him an order for the freight bill upon the defendants. Thereupon the order was given and witness and Newman then proceeded to the store of defendants, and deponent requested Mr. King, one of the firm, to pay over the freight to Newman—thinks the order was exhibited—Mr. King acceded and said the money should be paid to Newman when the freight was earned. Witness then stated to King particularly, the reason why he desired the freight paid over to New-

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man, viz: that he had been sued and Newman had become his security for an amount which the freight bill would about cover. Witness then desired the bills of lading to be altered, so as to make them payable to Newman, but King said in reply, that it would make no difference—he had already sealed his bill of lading, and it was unnecessary—the money should be paid to Newman. Upon further examination witness stated that he understood that Newman became his security in consequence of this understanding with King, &c. He further states that he never authorized any other person to receive the freight—that Robert Woods, then acting Clerk of the boat, was notified of the transaction. There was much testimony elicited by the cross-examination of said witness, which has no particular bearing upon the case, except as it was designed to impeach his credibility, and to prop the testimony of R. Woods, the Clerk. The deposition of Woods, which contradicted that of O'Farrel's in several particulars, was rejected—he being the Clerk who had collected the freight and made use of it.

Harrington testified that he knew O'Farrel gave an order to Newman before said bond in the attachment suit was executed—that he saw the order written before the bond was signed, and it was given on the condition agreed on between O'Farrel and Newman that the said freight bill should cover the bond: that he (witness) presented said order to one of the defendants, who refused to pay it, saying he was sorry Newman must lose it, but that they must pay the draft of Charles Doane, which they should have to pay to protect said Doane's credit, who was their agent, &c.

The defendants gave in evidence the draft of Charles Doane for said freight on the defendants in favor of said Woods for \$504, dated 23rd April, 1841, stating on its face that it was for the freight which was endorsed in blank, and on which was a receipt of payment from the defendants.

The Court gave the following instructions for the plaintiff:—

I. That if the defendants promised the plaintiff with the consent and privity of O'Farrel, to pay to the plaintiff the amount of the freight bill, and upon the faith of that promise the plaintiff became bound as the security of O'Farrel, and has since been compelled to pay the debt for which he became security; this was a sufficient consideration to support the promise.

II. That any advantage to the defendants, or loss to the plaintiff, growing out of the promise, was a sufficient consideration in law to support the promise.

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The defendants asked four instructions, the three first of which were given, and the last refused.

I. That the promise of the defendants to pay said freight bill to Newman was void in law, unless based on a good consideration.

II. That if the promise of the defendants to pay the freight bill to Newman was made after Newman had become security for O'Farrel upon the bond given in evidence, then such entering into security by Newman has no sufficient consideration to support the promise of the defendants.

III. That plaintiff cannot recover in this action unless the jury find from the evidence that defendants promised to pay Newman the freight in question, in consideration that Newman would become security for O'Farrel.

IV. That if the defendants did not assume in writing to pay to plaintiff the freight bill, there can be no recovery.

Exceptions were taken at the trial to the exclusion of Woods's deposition, the giving instructions of plaintiff, and refusing the fourth one asked by defendant. Motion for a new trial was made and overruled.

The only points which have been discussed by the appellants are, first, the propriety of the instructions; and, second, the correctness of the verdict, which the appellant contends is against the weight of evidence. The exclusion of Woods's deposition on the ground of interest, though excepted to at the trial, has not been urged here.

The first instruction is objected to because it admits the inference that the promise of the defendants would bind them if upon the faith of that promise the plaintiff incurred the liability in question, although the promise was made without any reference to such act of the plaintiff, in other words, the defendants conceive the instruction to sanction the idea that a past consideration will sustain a promise although there may be no moral obligation upon the person promising to perform the act promised. It may be conceded that such an interpretation might be placed upon this instruction, though we do not think it the most natural construction of the language of the Court, or one at all likely to occur to a jury unused to the distinction between executory and executed considerations. If it were liable to this construction, the third instruction given at the instance of the defendants, is so plainly expressed as to leave no room for misunderstanding the meaning of the Court. This last instruction is not inconsistent with the one first given at the instance of the defendants, but is only more specific and explanatory of the general proposition contained in the first. The instructions taken altogether

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*Stine vs. Wilkson and others.*

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were not likely to mislead the jury, especially as the point giving occasion to the criticism upon the first instruction, is one about which there was a conflict of testimony, and to which, therefore, the attention of the jury must have been mainly directed by the counsel who argued the cause.

In relation to the second point, we confess our inability to see any grounds upon which the Court could with propriety interfere with the verdict. Apart from the general objections entertained by the Court against disturbing the verdicts of juries where the law has been fairly and fully expounded to them, we have not found in the testimony detailed in the bill of exceptions anything to induce a conviction that the verdict in this case was not well warranted by the proof. It is true that the evidence of O'Farrel, upon which the jury must have mainly relied, was that of a partial witness; and it is also true, that his first account of the transaction between him and the plaintiff seemed to countenance the idea that the plaintiff had executed the bond before the order upon the defendants was accepted, but this statement is corrected upon further examination, and the transaction as he states it, carries intrinsic evidence of its own probability, apart from his positive assertions. Without entering into any particular examination of the evidence, we think the details given in the statement of the case will show that the verdict is warranted by the facts proven. We shall, therefore, let it stand.

Judgment affirmed.

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STINE vs. WILKSON AND OTHERS.

1. Chancery has jurisdiction to control the acts of a trustee, under a deed to secure the payment of money; and where the powers conferred on the trustees are not strictly pursued, will set aside his sales.
2. A more strict compliance is required where the *cestui que trust* has meddled with the duties of the trustee, and become the purchaser of the property, at a greatly reduced price.
3. Although no one act of the *cestui que trust* may of itself be sufficient, yet if all his acts taken together shew a fraud upon the debtor, the deed will be set aside.
4. Where the deed of trust required twenty days previous notice of the time and place of sale, it is not sufficient to have it published but once. The obvious intent is to have the publication continued up to the sale.



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5. Where a notice was published once in the "Evening Gazette," and then transferred to the "Atlas," it was held insufficient, although the "Atlas" was the weekly reprint of the "Evening Gazette," a daily paper—it appearing that the "Atlas" was published for, and circulated in the country, while the "Gazette" was almost entirely confined in its circulation to the city.

### APPEAL from St. Louis Circuit Court, (in Chancery.)

#### *GAMBLE & BATES, for Appellants, insist:*

1st. That the decree in this case must rest upon the establishment, by the evidence, of the facts charged in the bill as the ground of relief. Story on Equity Pleadings 24; 7th Wheaton 523.

2d. That the advertisement of the sale, (which is the only part of the proceeding in relation to which the bill makes charges, and upon which evidence was given,) is only to be impeached for the causes alledged in the bill, and these are: 1st. That it was published in a paper of limited circulation. 2d. That it was published but four times. 3d. That it did not state that there was a shot tower on the property to be sold. 4th. That there was no hand bills set up.

On the first, no evidence of comparative circulation was given. On the second, the publication was sufficient according to the terms of the deed of trust. 13th Ohio Rep.

The third and fourth objections are merely gratuitous additions to the duties of the trustee not warranted by the deed which prescribes his duties, nor by any law that regulates his discharge of such duties.

3d. The inadequacy of the consideration is not charged in the bill, and if it had been, it would form no ground of relief in a public sale, openly and regularly conducted, by the agent of both parties, and where there is no fraud charged or even attempted to be proved in the conduct of the sale.

It is stated in the bill that one Williams, at a sale of the property, bid \$2600, and then refused to take it. And it is also stated that Wilkson, at the same sale of the property of his bankrupt debtor, bid \$2600 for it, but it is not alledged anywhere what was the value of the property.

But if the complainants had charged inadequacy of price, this is not a case in which such charge would be of any weight.

#### *GEYER, for Appellees, relies on the following grounds:*

1st. The trustee was bound to execute the trust in all its parts in his own person, and was not authorized to commit any part of his duties to Stine, the creditor, or permit him to control the advertisements, or the management of the sale.

2d. Though a compliance with the letter of the deed of trust, may be sufficient to transfer the estate to a *bona fide* purchaser, standing in no fiduciary relation to the subject, yet in order to support a sale in equity, where the creditor is the purchaser, it must appear that every thing was done, usual in such cases, in order to effect a sale at a fair price.

3d. A single publication in a newspaper, twenty days before the day appointed for the sale, is not a compliance with the terms of the trust, and a publication of the same notice in some other paper, as in this case, within the twenty days, will not aid.

4th. The publication, first in the Gazette, and afterwards in the Atlas, is deceptive; and Stine having undertaken to discharge a material part of the duties of trustee, and afterwards becoming

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the purchaser, is bound to prove not only that no fraud was intended by him, but that no injury resulted from his acts.

5th. The deed of trust, so called, is in equity a mortgage with trust for sale, and the debtor and his representatives were entitled to redeem at any time before a sale, effected in good faith, should be completed—and in this case, at any time before a deed executed to Stine, he being only entitled to his debt and interest.

6th. The defendant Stine, after having acted in place of a trustee, could not become the purchaser, so as to preclude the right of redemption, as against McKinder and his creditors.

7th. In a mortgage or trust for sale, the trustee is not only bound to execute the trust in all its parts in person, but is bound to regard in all cases the rights and interest of the debtor, as well as the creditor, and cannot confide the discharge of any part of his duties to either, without a departure from his trust.

8th. It was most material to the right of the debtor and to his creditors, that the notice of sale should be such as to effect an advantageous sale. The creditor having, in this case, taken upon himself that part of the duty of the trustee, and becoming afterwards the purchaser, was bound to prove very clearly that every thing was done that could be done for the interest of the other party; or at least that no injury could, or did result to the debtor; having done neither he cannot be allowed to retain the advantage unduly obtained by his interference.

9th. The debtor in this case having reposed his confidence in the trustee, and not in his creditor, it was a violation of his rights to transfer the duties, or any of them, of that trustee to the creditor.

10th. If an advertisement once published twenty days or more before the sale, is a compliance with the letter of the deed, the property was not so described as to show what was to be sold—the trustee or his substitute ought to have mentioned every part calculated to attract purchasers, to the same extent that a prudent man would in a notice to sell his own property. If the trustee did not, his substitute did know of the existence of the shot tower on the lot, which gave it its chief value, and his subsequent purchase, under such circumstances, is a suspicious circumstance, which, unexplained, is evidence of a fraudulent design. The proclamation at the sale is no substitute for an advertisement, however often repeated by the auctioneer.

11th. The fact that Stine assumed the duties of the trustee, without the knowledge or consent of the debtor, that he requested a notice of sale to be written, which should allow barely time sufficient, and with a description according to the deed, when he knew and concealed from the trustee the fact of the erection of the shot tower, a fact not only material as affecting the value, but important in the description—that he selected a paper, in which to publish it, having no circulation in the country—that it was published in that paper only once, and then transferred to a paper in which advertisements are not usually inserted—that in fact, general notice was not given—that the property was of great value—known to Stine, and not made known to the public by the means agreed upon—that it was bid in by Stine, at one-sixtieth of its value, are circumstances which, unexplained, show that the whole proceeding was delusive, and the contriver ought not to be allowed to profit by it. *Green vs. Winter*, 1 J. C. R. 27; *Holdridge vs. Gillespie*, 2 J. C. R. 30; *Davone vs. Fanning*, ib. 252; *Howell vs. Baker*, 4 J. C. Rep. 118; 1 *Powell on Mortgages* 9-13; 3 do. 1043-1065; *Denning, et al. vs. Smith, et al.* 3 J. C. R. 332.

**McBRIDE, J.**, *delivered the opinion of the Court.*

This was a bill in Chancery, brought in the Circuit Court of St. Louis county, by the complainants against the defendants and others. In the bill it is alleged that a certain Edward McKinder, being indebted to the

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defendant, on the 6th September, 1839, executed his note to him for \$800, payable six months after date, with interest, at the rate of ten per cent. per annum, subject to two renewals of six months each; and in order to secure the payment of the said note, executed a deed, conveying to Josiah Spalding, in trust for the purpose aforesaid, a lot of ground adjoining the northeast corner of the town of Carondelet, in said county; it being the same lot of ground which was leased to McKinder, for the term of twenty-five years, from and after the 20th November, 1830, in consideration of the annual rent of thirty dollars, subject to renewal at double that rent by Anthony Wilkson and James C. Evans, and on which was erected a valuable shot tower, ready for operation.

That on the 20th January, 1840, Edward McKinder assigned to Wm. Robinson and James O'Hara, all of his property of every kind whatsoever, in trust, for the benefit of his creditors, amongst whom are the present complainants. That the property so assigned, embraced among other, the lot of ground on which was erected the shot tower, adjoining the town of Carondelett, and which had previously been deeded, in trust, to Josiah Spalding.

That on the 8th February, 1840, Robinson and O'Hara, as trustees, advertised the lot in question for sale, and on the 29th of the same month the lot of ground was publicly offered for sale, before the court house door in the city of St. Louis, and a certain Edward L. K. Williams, being the highest bidder, it was struck off to him, at the sum of \$2600, subject to incumbrances thereon, amounting to between twelve and fifteen hundred dollars. A short time previous to the sale, Robinson, one of the trustees, left the country, and has not since returned—that Williams, the purchaser, refused to accept the individual bond of O'Hara, the remaining trustee, for a title, and also refused to pay the amount which he bid for the said property.

That prior to the falling due of the note executed by McKinder to Stine, O'Hara the trustee, McKinder and Wilkson were anxious, and each of them offered to renew the same for six months after its maturity, according to the provisions of the deed of trust, but Stine refused to assent to the same. When the note became due, Spalding, the trustee, advertised the lot of ground aforesaid for sale, in the "Evening Gazette," a paper published in St. Louis, and on the 1st April, 1840, at the court house door, in said city, exposed the same to sale, when Jacob R. Stine, the defendant, and *cestui que trust*, being the highest bidder, it was struck off to him at the sum of \$106 00. That Wilkson, one of the complainants, was a creditor of McKinder at the time, to the amount of \$3000,

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and resided in Washington county, about eighty miles from St. Louis, did not see the advertisement of the sale made by Spalding, nor hear any thing about it until he came within a mile or two of St. Louis, on the day the sale took place, when he heard to his great astonishment that the property had been sold and sacrificed.

That as soon as he reached the city he went to see Stine, and offered to pay him the full amount of McKinder's note, with interest and costs, which he declined to receive, and this offer was made by him as a creditor of McKinder, in about three quarters of an hour after the sale was made, and before a deed had been made by Spalding, the trustee, to Stine. Immediately after the proposition of full payment was made to and refused by Stine, Wilkson called upon Spalding, and offered to pay to him as trustee the full amount of McKinder's note, with the interest which had accrued thereon, but that Spalding also refused to accept the same.

That the "Evening Gazette," as was well known to Stine, had a very limited circulation beyond the limits of the city of St. Louis—that the advertisement of Spalding was published only four times, and merely gave the boundaries of the lot of ground in question, with a few other particulars, but did not state the fact that a valuable shot tower had been erected upon the said lot of ground, which constituted its chief value, but the same was omitted intentionally in order to mislead the community, and defraud those interested. That no pains were taken to give publicity to the sale, by advertisements circulated, or stuck up in any of the public places in the county of St. Louis, stating the time and place of sale, and giving a full and true description of the lot of ground about being sold, and the shot tower thereon.

That the shot tower erected on the lot of ground in question, cost between six and seven thousand dollars for its erection; and that the said complainant Wilkson, at the sale made by O'Hara, bid for the said lot of ground, subject to all the incumbrances on the same, the sum of \$2600.

That Stine took possession of the lot, and the shot tower thereon, on the day of sale, and has put the shot tower into operation, and is now in possession of the same, enjoying the profits thereof. Jacob R. Stine, Josiah Spalding, Edward L. K. Williams, William Robinson, and James C. Evans, are made defendants. The bill concludes with a prayer, that the deed from Spalding to Stine, be vacated and annulled and given up—that Stine be compelled to surrender possession to O'Hara, assignee of McKinder, and pay damages, or reasonable rent, from the 1st April, 1840, for the premises—that all right or title acquired by Williams, at

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the sale made by Robinson and O'Hara, be extinguished and forfeited—that the powers vested in Robinson be revoked, and that O'Hara be fully invested with the power of selling and conveying the premises, under the provisions of the deed of McKinder, made 21st of January, 1840, and for general relief.

On the coming in of Josiah Spalding's answer, the bill was dismissed as to him. An order of publication was made as to Robinson, and a decree *nisi* against him, and on the hearing, the bill was dismissed as to Evans—Williams did not answer.

The answer of the defendant, Jacob R. Stine, states that McKinder failed to renew his note when it became due; and called on him before the property in the deed of trust was advertised by Spalding, the trustee, and informed him that he could not renew the note, and to go on and make the sale. Denies that McKinder, O'Hara, or Wilkson, offered to renew the note of the former, or that the latter offered to give his own note in lieu with good security. That after a failure of payment or renewal of the note, the defendant called on the trustee Spalding, to take the necessary steps for a legal sale of the property in the deed of trust, and that said Spalding wrote a notice of the sale, describing the property as the same is described in the deed of trust, and gave it to him to be published as required in the deed of trust.

That the defendant caused the said notice of sale to be advertised in the "Evening Gazette," a newspaper published in the city of St. Louis, and having, as he understands, a large circulation, particularly in the city of St. Louis, and its immediate vicinity, where nearly all of the complainants reside. Denies that there was any purpose on his part, or that of the trustee, to conceal any fact in relation to said property, which could render it more saleable in the market; and denies that there was any purpose to prevent the general knowledge of the sale, by selecting the "Evening Gazette" for the publication of the notice of sale. He did not expect to conceal the notice of said sale, when he caused the advertisement to be published four times weekly, in a newspaper which circulated all over St. Louis, and when the deed of trust required no more than one insertion of the advertisement.

That William J. Austin, the auctioneer, was employed to make the sale, and in doing so he did proclaim that there was on the premises a shot tower, which had cost several thousand dollars. The sale was made at the same time when the said auctioneer was selling other property, and when there was a large collection of people attending such sales, and in front of the court house door. That the respondent became the purcha-



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ser of the property at said sale for the sum of \$106, and has received a deed from Spalding, the trustee. After the sale had been made, and on the same day, Wilkson, one of the complainants, offered to pay the amount of McKinder's note, if the defendant would release the property, which he declined to do, believing that he was under no legal or moral obligation to do it. Since his purchase, proceedings have been instituted to enforce divers liens of mechanics, and he will have to pay divers sums of money to clear the said property from incumbrances.

That before the note of McKinder fell due, the respondent offered to said Wilkson, to receive security therefor, and for another incumbrance which he had on the premises, and release said premises from all of his claims, but that Wilkson would not accede to his proposition. He denies fraud, &c.

To the answer of the defendant Jacob R. Stine, the complainant, filed a replication.

On the 24th January, 1843, the cause came on for hearing in the Circuit Court, upon the bill, answer, replication, exhibits and proofs, when the Court decreed that the sale made by Spalding, the trustee, be set aside, and that the deed which he executed to the defendant Stine, be cancelled and annulled. The Court found that Stine had taken possession of the premises in controversy, on the day of sale, and still retains the possession, wherefore he ought to account for the reasonable rent thereof, and appointed a commissioner to take an account of the same, as also an account of debt, interest, and costs of the note of McKinder, and such other disbursements as were legally made by the said Stine, and report. After the report of the commissioner, the Court entered a decree in conformity thereto, and the foregoing principles, from which the defendant appealed, and has brought the cause here.

The evidence preserved by the bill of exceptions, shows that the several deeds referred to in the bill and answer were read in evidence.

Josiah Spalding, a witness on the part of the complainants, testified that he acted as trustee for Mr. Stine in the suit. About the time of the sale, before the notice was given, Mr. Stine called on me at my office, stating that McKinder could not renew the note, and that therefore he must proceed under the deed of trust, and requested me to advertise and have the sale made according to the deed. I drew an advertisement for the sale, which I think described the property in the deed of trust, and gave him the advertisement and directed him to have it inserted in some of the city papers for the requisite time—don't recollect the time. I don't think I knew what paper it was in until Mr. Stine brought me the

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paper containing the advertisement, in order that the sale might be made. At the day, hour, and place of sale mentioned in the advertisement, I procured Mr. Austin to sell the property, and he proclaimed that there was a shot tower on the premises—it was struck off to Stine at a small sum—don't recollect the amount.

Sometime afterwards, on the same day, a gentleman called on me, said his name was Wilkson, and said he wished to pay the amount due to Stine, mentioned in the deed of trust, so that the sale would not be carried into effect. I told him that I was a mere trustee, and referred him to Stine, remarking to him, from his statements to me, that I should be much gratified if Mr. Stine would take the money and let the matter end. He then said he had already seen Stine, and that he refused to settle the matter in that way. I told him then if Stine insisted on it, I must give him the deed. Stine afterwards called for the deed, and I executed it to him. I don't remember the hour of sale, but have no doubt I was there at the hour. When Stine came to me to draw the deed, I think there was a conversation in relation to the matter, the tenor of which I do not recollect, but I do not recollect whether he said that Wilkson offered him the money—Wilkson came in and told me that he had the money ready to pay me, but the necessity of paying it was done away with by my refusing to receive it. I do not know who accompanied Wilkson, or whether any one did—I recollect that Mr. Risque called, and stated Mr. Wilkson's claims.

It was after the sale, upon the same day, and before the deed was made, that Mr. Wilkson called on me—I cannot tell whether the deed was made upon the same day, or the day after—Mr. Stine called very soon after the sale to have a deed made out. I knew he took means to take possession directly after the sale, perhaps the same day or the next day, as he was apprehensive they would get possession and give him trouble. I do not know whether I advised Mr. Stine about receiving the money or not. I think that the certificate of the printer was brought to me, stating that the notice had been published the requisite number of times. I do not recollect whether at the time I drew the notice, I knew that there was a shot tower on the land described in the notice—but, upon reflection, I think I did know that a man by the name of Evans had been engaged in building a shot tower there. I do not know that I made myself acquainted with the particulars, as to how much of the shot tower was built, or how much it increased the value of the land. I do not recollect whether John D. McMurphy called on me before the sale, and asked me to postpone

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the sale as long as possible, that Wilkson might be here in time for the sale.

Cross examined :—Robinson & McMurry was a firm in this city; John D. McMurry, the partner, resided here; I suppose the firm had been doing business here; Holman & Axtell was a firm doing business in the city also; I do not know John C. Atkison; do not know E. L. K. Williams; I think it was the "Evening Gazette," in which the notice was published; the style of the paper was the "Western Atlas and Saturday Evening Gazette;" the publication in that paper did not surprise me; it did not strike me as being defective on account of the number of the circulation of that paper; I have been concerned in a great number of trust deeds, and I do not recollect that I ever made out a description in a notice different from that in the deed; I have generally handed them to the party or his agent, if in the city, and gave myself no further concern in the matter until the sale; the place where an advertisement is most likely to be read, when published in a newspaper, is where it immediately succeeds the editorial matter; I do not remember whether Mr. Stine requested me to allow some days more than necessary in order to enable the holder to renew the notes; defendant's exhibit B., No. 2, is the deed that I executed to Stine; I cannot say that I executed it the day it bears date, or on the day it was acknowledged; it was dated the 1st of April.

I do not recollect whether there was any other property sold at the court house on that day, or whether Austin, the auctioneer, was then engaged in sales; I do not recollect any movement or action on the part of Mr. Stine, calculated to deter any person from bidding; I did not observe any difference in the sale from what takes place usually upon sales under deeds of trust; I did not see any action of Mr. Stine, in preparing the sale, or at the sale, which led me to suppose that he wished to obtain an undue advantage; after the sale I thought he was rigorous in enforcing the sale, and not taking the money, insisting upon his legal rights; I myself should have taken the money, not on account of any legal right existing on the part of Wilkson, but as a matter of liberality; I should do so in every similar case if it were my own affair.

Re-examined :—I never took the Evening Gazette, or Western Atlas; and do not know that the Evening Gazette circulated in the city, and the Western Atlas in the country; I think the notice was published weekly for the time; I have, in sales in the city, advised that the notice should be published daily, and that, in order to make it bring as much as possible, that hand-bills should be struck off, but I have not advised it to be done in sales of country property; it is customary in sales of city pro-

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perty to have hand-bills struck off, I think, but not of sales of property in the country; I do not know, at that time, I saw either of the papers, or that I ever saw the Western Atlas; I did not take either of the papers; I do not know that it was transferred from the Gazette to the Atlas; I gave no directions about the publications that I recollect of; Mr. Stine might have come to me and obtained directions about the paper, the mode of publication, and all particulars, but at this time I cannot recollect it; as trustee I acted for the interest of all concerned.

William Bayliss, testified:—On one occasion I rode down with Mr. Byrne, who had some intention of purchasing the shot tower, to look at it; I presume it was about the 1st April, 1840; I have no recollection as to the precise month; as well as I recollect we were told by some person at the time we were at the tower, or afterwards, that it had been sold, and that Stine had bought it; then the matter ended so far as he was concerned; it was Mr. Byrne's intention, as he told me, to purchase it, if he could obtain it at a reasonable price; I have no recollection as to what conclusion we came to as to its value; I have understood that Mr. Byrne has means to invest in property of that description; I have no recollection of having seen the notice of the sale by Mr. Spalding, though I might have seen it; the matter made but very little impression on my mind; I went into the shot tower; it looked to be well built, though I do not consider myself a judge of such things; I do not think it was entirely completed, though I may be mistaken; I think shot had been made there, though I cannot be positive; I was told by the individual there that there was something to be done to complete it; the whole matter made so little impression on my mind that I cannot be positive; we did not know that the property was not for sale, or we should not have gone; I think that the person in charge there told us that Mr. Stine had purchased it.

Jerry S. Allen, testified:—I was one of the proprietors of the Gazette and Atlas, at and previous to April, 1840; the notice of the sale of Mr. Spalding was handed into the office, and ordered to be inserted four weeks; it was first published in the Evening Gazette one insertion, and then transferred from the Gazette to the Atlas; it was published in the Atlas of the 14th March, 21st March, and 28th March, 1840; it was published first on the 11th March, 1840, in the Evening Gazette; I think the notice of sale was published at the request of Mr. Stine; I never had any communication with Mr. Stine; I had the charge of the printing department, and received directions to transfer the notice from Mr. Holbrook, my partner; it was inserted in the Gazette of the 11th March, and after the first insertion I received directions from Mr. Holbrook, to

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transfer it to the Atlas; the Gazette and Atlas are different papers, one is calculated for city circulation, and the other for the country; one is daily, and the other weekly; the advertisement of the country paper is transferred, as a matter of course, from the daily paper to the weekly; the Gazette was intended as a commercial paper; the matter of the Atlas was chiefly made up from the matter of the Gazette; there were articles in the Atlas which were not published in the Gazette; the circulation of the Atlas was very limited in the city; its circulation was principally in the country, amounting to about four hundred; on one or two occasions there were orders given to transfer similar notices from the city to the country paper, though it was not the usual practice; as near as I can recollect the Atlas did not circulate in Washington county, though I could not tell unless I refer to the subscription book; the Gazette was not sent to Washington county.

Cross examined:—The advertisement in the Gazette is in the most conspicuous part of the paper, being the place for the new advertisements; the weekly paper is composed of matter contained in the daily; the same type which was set up and used for the Gazette, was placed in the form of the Atlas, though the Atlas contained one page, (the third,) which was set up for the Atlas, and did not appear in the Gazette, except sometimes when it was transferred from the Atlas to the Gazette, when there was room for it; the title of the weekly paper, is the "Western Atlas and Saturday Evening Gazette;" if a notice was handed to me, without any direction, which was to be published weekly, I should place it in the Gazette; the Gazette was understood to be the paper for advertisements; the advertisements were transferred from the Gazette to the Atlas as we had room for them.

Re-examined:—The circulation of the Gazette was from 900 to 1000, principally in the city.

Thomas Byrne, testified:—I had some idea of purchasing the shot tower in the spring of 1840, and went down to look at it, but whether it was before or after I learned it was for sale, I cannot say; I saw nothing of the advertisement of Mr. Spalding, but heard some time before the sale that the property was for sale, or would be sold, but at what time I was not informed; I had not made any specific intimation of the value of the property; I had made enquiries as to what the property was worth, situated as it was near St. Louis; I did not make up my mind what it was worth, as I learned it was sold; I did, however, say to some gentlemen that if it was clear from incumbrances of every kind, it might be worth from \$2500 to \$2700.



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Cross examined:—When I spoke of the property as being worth from 25 to \$2700, it was with the understanding that it was free and clear from all incumbrances.

James B. Bowlin, testified:—I brought three suits for the bank against Wilkson, on notes, one of which was made by Wilkson, and the two others by McKinder; after I had obtained judgments in the suits I sent executions to Washington county, and an arrangement was made by Mr. Wilkson with the bank, to pay in instalments at four months; I received one instalment \$500, less the sheriff's commission \$492; I have seen many signatures which McKinder acknowledged to be his, and think that the notes in the suits, which witness holds in his hands, are his.

There was a large amount of rock to be excavated in building the tower, much labor must have been expended in its erection; I should think it must have cost \$4000, but it is very much a matter of guess with me, as I am not acquainted with such work; Mr. Stine has been for the last two years working in the shot tower; does not know what the rent of it, per annum, is worth.

Cross examined:—At the same time I brought the suit against Wilkson, I brought suit against McKinder, and before I could obtain judgment against him he became insolvent.

Hiram Paddleford, testified:—I understood the shot tower was to be sold on the 1st April, 1840; I understood it from various persons, and I think Mr. Stine told me so; I was not present at the sale; I presume it was the sale by Mr. Spalding, as trustee; I had conversations with Mr. Stine about the shot tower, in the event of his purchasing it; that there might be arrangements made that we should manufacture shot together; he said he thought he should be the purchaser; he said that it was advertised in an obscure part of the paper, and he thought it would not be noticed; he said nothing about the prospect of there being other bidders for the property; I do not recollect that Mr. Stine said any thing about giving directions to have the notice published in an obscure part of the paper; he told me after the sale that he was the purchaser for a small amount, something over \$100; the amount I do not know exactly.

On the day of the sale, and after the sale, Mr. Stine directed me to take possession of the property; that he thought if he took possession there would be no difficulty in holding it; I rode down immediately after he conversed with me, and took possession of the tower; Mr. Evans came to the tower soon after I took possession; perhaps half an hour or less Mr. Wilkson and some others came there; Mr. Wilkson seemed to be angry, and thought there were some wrong proceedings about it; Mr.

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Wilkson took formal possession of the tower, as he said, in the names of the persons present, who were McMurry, McKinder, and some others that were there; soon after Mr. Wilkson came there some difficulty arose between him and James C. Evans; the cause of the difficulty was some words that originated from the other parties, which words I do not recollect; I do not know whether I ever saw any money offered by Mr. Wilkson to Stine, nor do I recollect that Stine ever told me that Wilkson offered him the money in payment of the notes; Mr. Stine told me that Wilkson offered to pay him \$800, and that he told Wilkson if he would pay him all of his claims against the tower he might have it; Mr. Evans brought me written directions from Mr. Stine to take possession of the tower; independent of the written directions, Mr. Stine requested me to take and keep possession, if I could do so.

I have been concerned in the management of the tower after Mr. Stine purchased it; at that time it might have been rented for \$1000 per annum; I would have been willing to have given that sum for it; I have not actual knowledge of the cost of the tower, but suppose it might have cost from \$5000 to \$7000; it was not entirely completed, but nearly so; it might have cost from \$200 to \$500 to complete it.

Mr. Stine told me that the advertisement was in an obscure part of the paper, and probably there would be no one to bid upon it except himself; this conversation might have been a week before the sale; cannot say whether, at the time he mentioned about the advertisement, he asked me to help carry on the business; it was before the sale that he spoke to me about assisting him in conducting the business.

Cross examined:—The value of the yearly rent is different now from what it was two or three years ago; I would not now be willing to give more than \$300 per annum; I do not know that I would give that sum; in speaking of the cost of the tower I am guided by what I have heard from others; I have no actual knowledge of the cost; I do not know who was in possession of the tower, but perhaps Mr. Evans was; I found no other than Mr. Evans in possession when I went down there; Mr. Wilkson, and the others who came with him to the shot tower, avowed their intention to be, in coming, to take possession of the tower; Mr. Wilkson spoke of the sale having taken place that afternoon; I knew McKinder; I do not know, only from report, that he was insolvent; I knew nothing about his circumstances.

John Bent, testified:—I cannot say that I recollect any conversation between Mr. Stine and Mr. Wilkson on the day of the sale. Mr. Stine then had his office in the same building with me. A few minutes after

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the sale was over, Mr. Wilkson came into my office. Mr. Stine afterwards asked me about the legality of the advertisement—he told me that there had been a long notice, that he had waited for Mr. Wilkson, and felt it necessary for him to bid at the sale. He also told me that Mr. Wilkson wanted to pay up, and discharge the debt, and have the deed made to him, but Stine said he did not know that there was any obligation upon him to do so. They held a conversation in my presence, but what it was I am unable to detail.

Cross examined.—Mr. McKinder was at that time bankrupt, and I believe had taken the benefit of the insolvent laws—he told me that he had made an assignment.

Thomas B. Targee, testified:—I was auctioneer to Conn, Sprigg & Green, and sold under a deed of trust, by request of Capt. O'Hara, on 29th February, 1840. The property was knocked down to old Mr. Williams, at what price I do not recollect, but think it was in the neighborhood of \$2600 or \$2700. I cannot recollect whether there was any thing said about incumbrances on the property. There were other bidders at the sale besides Mr. Williams—I had nothing further to do with it after the sale.

Cross examined.—The Williams who purchased was Mr. E. L. K. Williams—I know nothing about Mr. Williams's ability, but it produced some little surprise in my mind to find him the purchaser. I do not know whether Mr. Williams was a by-bidder or not—Capt. O'Hara, I think, was at the sale.

Peter Tiernan, testified:—I was present at the sale of this property by McKinder's assignee, Capt. O'Hara; the time of the sale was about the 29th February, 1840—it was knocked off to Mr. E. L. K. Williams at \$2700, the last bid before Mr. Williams was by Wilkson and John Perry, for \$2600. I heard Mr. Wilkson bid, and Mr. Perry afterwards told me that he and Wilkson were to be in partnership. There was at the time of the sale nothing said about incumbrances by the auctioneer, but some person then said there was an incumbrance of \$800 on the property. Mr. Williams and Mr. Wilkson both told me that they knew of the incumbrance, and at the same time said it had some time to run, and could be renewed at 8 per cent. on the amount.

I was not astonished at Mr. Williams bidding—after the purchase was made Mr. Williams asked \$150 as a *bonus* for his bargain—Wilkson offered him the use of that sum for 6 or 12 months at 6 per cent. as a *bonus*, but Williams declined taking it without he could have his own time for payment. Mr. Edward McKinder built the shot-tower. Hav-

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ing seen the bills of the carpenter, and been there frequently while it was going on, I think it could not have cost less than \$5000,—amounts were shown me up to about \$6000. Mr. McKinder admitted to me that Mr. Wilkson had furnished the greater part of the funds for building the tower. Mr. Wilkson is a miner of lead in Washington county.

I was present at the sale made by Mr. Spalding—it was about 12 o'clock, M.,—there were not a great number of persons present. I saw Mr. Wilkson in 10 or 15 minutes after the sale—I had not left the front of the Court House when he came up—he started off to find Mr. Spalding—did not see him that day in company with Mr. Stine. I cannot say whether Stine ever told me that he and Wilkson had an interview on that day. I think there were three bids on that day—it was struck off at \$106. I am under the impression that Mr. Stine started it at \$100—some other person bid \$5, and Mr. Stine then bid one dollar more.

Cross examined.—At the second sale Mr. McKinder and McMurry were present. Mr. O'Hara was also there, I think, but am not positive; being a sale under a deed of trust, of a single piece of land, there were not so many present as at a sale of several pieces of land. Mr. McKinder was indebted to me, but I had not come into the assignment, but told McKinder when he was able he might pay me, and I thought if this property brought a fair price I might perhaps get my money—that was the only interest that induced me to attend the sale at all.

John H. Baldwin, testified:—It was along in the middle of the day which I heard was the day of sale, that I saw Mr. Wilkson. Mr. Stine was then collector, and had his office near me. I did not see Stine and Wilkson in conversation on that day.

Elijah Hayden, testified:—I know the signature of both Robinson & McMurry—the note shown me dated 13th January, 1840, is the signature of Robinson. Witness is also shown a note of Edward McKinder, dated 16th Sept., 1839, for \$900, endorsed "Robinson & McMurry," "Anthony Wilkson." This is also the signature of Robinson.

The complainants then gave in evidence the promissory notes about which Bowlin, Baldwin and Hayden testified, showing that Edward McKinder was indebted to the complainant, Anthony Wilkson.

D. L. Holbrook, a witness for the defendant testified:—I was before, and on the 1st April, 1840, one of the proprietors of the Evening Gazette—the advertisement of Mr. Spalding as trustee is published in the most conspicuous part of the Evening Gazette, of the 11th March, 1840. I do not recollect that I received any directions in regard to the advertisement—I know of no reason why the advertisement was transferred,

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except in case of sales of property lying in the country ; the advertisement was usually published in the country paper, which was made up of matter published in the daily paper, and had the title of the "Western Atlas and Saturday Evening Gazette." The transfer was such a one as would have been made by me without any directions, though it was Mr. Allen's business to arrange the matter of the paper. The paper I call the country paper, was a weekly paper—I consider them as much one paper as the daily and weekly Republican, and generally there was no other matter in the weekly but what had been in the daily. The transfer would not have been made from the fact that the advertisement was to be published weekly, as many advertisements of that kind were published in the daily. The Sheriff's advertisements of sales are put in the daily, and he pays the common advertisement price. I do not recollect having received any directions in relation to this advertisement at all.

Cross examined.—I have no recollection of having given any direction to Mr. Allen as to the transfer—it was Mr. Allen's business to make up the forms—the placing the advertisements rested with Mr. Allen, unless some directions were given, and then I gave the same directions to him. I have no recollection of having given any directions to Mr. Allen to transfer an advertisement without having myself received some directions about it. In advertisements of sales under deeds of trust and Sheriff sales, I did not usually look over them, but handed them to the compositors. After that, there was nothing more to be done before looking over the proof—I did not generally read the proof about that time—in our office the proof is usually taken from the galley ; after the proof is read, it is the duty of Mr. Allen to correct it, and make up the form. I did not generally interfere in making up the form unless it is to dispose of some matter by special request. Before the proof is read, we do not generally know whether the property advertised is in the country or town. I have no recollection about the particular advertisement. I do not know that I ever transferred a Sheriff's advertisement of this county from the Gazette to the Atlas—the Sheriff sometimes advertises property in the country—I have no recollection of any other case when, without special direction, I transferred an advertisement of this kind from the Gazette to the Atlas ; it might have been that for a short time, a few months, one page of the Atlas was made up of matter not previously published in the Gazette, but generally it was wholly made up of matter before published in the Gazette. I do not know what the reason for inserting an advertisement in the weekly paper rather than in the daily unless when the property is in the country—the coun-



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try paper circulates in the country—and the daily paper does not go out of the city—the country paper does not circulate much in the city—from 80 to 100 copies circulate in the city. As a general rule, if an advertisement was handed in, it would go in the city paper, and not in the country paper;—if an advertisement was handed in without any direction, I should not, of my own accord, insert it in the city paper, and then transfer it to the country paper. The circulation of the city paper was at that time about 800—it ran from 700 to 1000—the circulation of the country paper was about 350.

The reason of the difference in name of the two papers was, that one was intended for city and the other for country circulation. I believe that there is a difference of title between the daily and weekly Republican. The Atlas was not a paper intended for advertisements—without directions, I should not have inserted an advertisement in the Atlas.

William J. Austin, testified:—I am a regular auctioneer of the city, and been engaged in that business 23 years. I acted as auctioneer in the sale made by Mr. Spalding, as trustee of McKinder, of the property on which the shot tower stands, on the 1st April, 1840. The attendance was as large as usual on such occasions—a pretty large crowd—there was a sale of another piece of property there on that day, and the attendance was larger than usual in sales of that description. At the commencement of the sale, I read the advertisement of the sale, and made mention that there was a shot tower on the premises, and that the property was valuable—worth several thousand dollars. Capt. O'Hara was present at the sale. McKinder and McMurry were also present. I do not recollect that either of the firm of Holman & Axtell was there. I dwelt on the sale as long as usual. I wished to obtain as much as possible, and as long as there was a possibility of obtaining a bid, I dwelt. I used as much exertion as is common to recommend the property to the by-standers. Mr. Stine spoke to me to make the sale—there was no request on his part for me to do anything at the sale to give him the advantage. I had seen the advertisement of the sale before I was applied to, to make the sale. Mr. Stine did nothing at that sale to discourage bidding that I recollect of;—the sale was made as sales of that description are usually made, by reading the advertisement and announcing the sum to be raised. McKinder spoke something about the matter, but what, I do not recollect; perhaps he spoke of there being liens on the property. There were other bids besides that of Mr. Stine's. Witness produces a memorandum book, in which is sale of property by order of Mr. McKinder. I think from that memorandum that Mr.

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*Stine vs. Wilkson and others.*

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McKinder must have spoken to me about making the sale. Knowing that McKinder, O'Hara and McMurry were interested in the matter, I appealed to them to bid.

Cross examined.—From the memorandum made, I think that McKinder ordered the sale—perhaps it may be a mistake, or by the order of the trustee of McKinder. I must have seen the advertisement in the Gazette. I do not think that I was directed by Mr. Stine to announce the value of the property, but did so of my own accord. I commenced the sale between 12 and 1 o'clock. I think I saw Mr. Wilkson in the afternoon of that day, but am not certain. I cried the property 15 or 20 minutes, I suppose. I think there was something mentioned at the sale about incumbrances other than the deed of trust, but whether I mentioned it I cannot tell. I cannot tell whether Mr. Stine conversed with any of the by-standers while the sale was going on. I have been frequently engaged as auctioneer at sales under deeds of trust;—it is usual to sell property with valuable improvements on it without hand-bills;—property improved by a shot tower, is out of the usual character of improvements in advertisements of sales under deeds of trust; very little is usually said about the improvements—sometimes saying with the improvements thereon, and sometimes describing the improvements.

Joseph Leblond, testified :—I live in Carondelet, and was, at the time of the sale by Spalding as trustee, and still am, Post Master at Carondelet.

The Western Atlas and Saturday Evening Gazette came to my office, and still comes there—I could not say that I saw the advertisement of the sale by Mr. Spalding, but I heard of it. I do not take the paper myself, but Mr. Hoffman, who keeps a hotel in Carondelet, does. I cannot tell whether I heard of the advertisement of the sale before it took place or not;—at the day of the sale I talked with Mr. Stine, and he told me I had better go and buy the shot tower, but I told him there were too many difficulties about it, or that I did not want to get into difficulty.

Cross examined.—At the time of the sale there came two copies of the Atlas at the office, both, I believe, to the same person, Mr. Hoffman. One was the Evening Gazette and the other the Atlas.

James C. Evans, testified :—I heard, before the sale by Mr. Spalding as trustee, a conversation between McKinder and Stine, when McKinder told Stine that he could not pay the debt, and that Stine must proceed and sell the factory. This conversation was about one month before the sale by Spalding as trustee.

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*Stine vs. Willson and others.*

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In the investigation of this case we have been led to the examination of the principles governing mortgages, inasmuch as deeds of trust are assimilated so nearly thereto. A mortgage is a conveyance of an estate by a debtor to his creditor as a security for the payment of money, with a proviso that the conveyance shall be void on such payment. If payment be not made according to the terms of the deed, the creditor may file his petition against the mortgagor and those in possession of the mortgaged premises, praying that judgment may be rendered for his debt, and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount of said debt. A deed of trust is a conveyance of an estate by a debtor to a third person as a security for the payment of money to another, with a proviso that in the event of non-payment as stipulated in the deed, the trustee shall make sale of the estate and apply the proceeds to the payment of said debt.

It will then be seen that the only material difference between a mortgage and a deed of trust, consists in the intervention of a trustee, vested with the power to sell. The trustee is regarded as agent for both debtor and creditor, and should stand indifferent between them, as it may not unfrequently happen that questions of importance will arise in the discharge of his duties which will demand his impartial action. Although the law is so, yet we cannot close our eyes to the fact, that most generally the trustee is selected by the creditor, because of his known subserviency to him, and instead of looking to the interest of the debtor, he is alone prompted to action from the impulse given by the creditor. The creditor, therefore, having the virtual power of appointing the trustee, and infusing action into him, it is not unreasonable to hold the creditor and his agent to a strict accountability for the manner in which the trust is discharged. If the question were now presented for the first time in this Court, we should be strongly inclined to adopt the language of Judge Tucker, in his notes, and say "it may well be doubted, indeed, whether upon principle such a contrivance could elude the operation of the broad principle of equity, that every contract for the securing of money by the conveyance of real estate to the lender, not made in contemplation of an eventual arrangement of property, is is equity deemed a mortgage."

Deeds of trust having become so common in the practice of this country, and having received the sanction of our Courts, it now only remains to adopt such principles for their government as will most effectually secure the rights and interests of the parties to them. This prerogative, Courts of Chancery have claimed and exercised wherever deeds of

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*Stine vs. Wilkson and others.*

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trust have been tolerated. They have interfered and restrained the trustee from proceeding to sell in cases where the debtor claimed to have paid the debt intended to be secured, or a part of it, as also where there was a supposed defect in the title of the property conveyed by the deed until an investigation could be had and the title freed from doubt or embarrassment. The trustee has, by the Courts, been compared to a commissioner of a Court of Chancery, for a sale of lands under its decree, having no greater powers, and having no other than those given by the decree. His sales are put upon the same footing of judicial sales. If the powers conferred on the trustee are not strictly pursued, the sale will be set aside by a Court of Chancery: this, however, we are informed, should not be done on frivolous grounds, where a stranger has become the purchaser. But very different is the rule where the *cestui que trust* has officiously intermeddled in the duties of the trustee, and become the purchaser at a sum greatly below the value of the property, or where he has by his conduct prevented other persons from bidding, whereby the property is sacrificed and bought in by himself.

We are not prepared, however, to go the entire length contended for by the complainant's attorney, and hold that at any time before the execution of the deed by the trustee, the debtor or those interested as creditors may come in and pay the debt, interest and costs, and abrogate the sale, where there has been no unfair conduct on the part of the *cestui que trust*, however inadequate the price at which the property sold. Although in so deciding no greivous wrong would be done the *cestui que trust*, as the object which he had in view in taking the deed would be attained. Policy alone forbids the adoption of such a principle.

In adverting to the testimony in the cause, our minds are irresistibly led to the enquiry, how has it happened that property worth from \$4000 to \$5000 was sold at public auction for the inconsiderable sum of \$106? Property which a few months before in the same market sold at public auction by a trustee, with an admitted and known incumbrance of 12 or \$1500 thereon, for the sum of \$2600; and there is no evidence that it was less valuable at the second than at the first sale. Although no one of the various circumstances attending the transaction is sufficient of itself to force absolute conviction that there was unfairness, yet taken all together, and coupled with the ruinous sacrifice of the property, and we are satisfied that the transaction was not fair.

Mr. Stine appears to have known that there would be little or no competition in the biddings, and that he should most probably acquire the

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*Stine vs. Wilkson and others.*

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property at a greatly reduced price ; for prior to the sale he informed Mr. Paddleford that he expected to become the purchaser, and for what reason? because he said the advertisement of the sale by the trustee was inserted in an obscure part of the paper. Whether this was said in reference to publication in the Gazette or Atlas is not stated—it was not true of the notice published in the Gazette, but may have been true of the other publication.

The insertion of the advertisement of sale by the trustee once in the Evening Gazette, and then its transfer to the Atlas, is another circumstance calculated to excite suspicion. Mr. Allen says that he received orders from his partner, Holbrook, to make the transfer, and although the latter cannot recollect of having received any such direction from Mr. Stine, yet he says positively that he never gave orders to make transfers without direction to that effect from those having a right to control the matter. After the sale, and on the same day, and after an interview with Mr. Wilkson, it appears that Mr. Stine's mind is still laboring on the subject of the notice, for Mr. Bent says that Mr. Stine enquired of him about the legality of the advertisement—that Stine told him that there had been a *long notice*—that he had waited for Mr. Wilkson, and felt it necessary for him to bid at the sale—that Wilkson wanted to pay up and discharge the debt, and have the deed made to him, but Stine said that he did not know that there was any obligation upon him to do so.

Stine appears to have been the first to raise any question as to the sufficiency of the notice, or of the manner of its publication, and builds his hopes, first to acquire the property at the sale, because there would be few bidders, in consequence of the manner of the publication of the notice, and, secondly, to hold the property under his purchase, thus superinduced because there had been a *long notice*. But still, possession is a strong point in the law, and it may be well to bring this to the support of his title, and hence he parlies with Mr. Wilkson under the pretext that he wants a short time to reflect upon the proposition which the latter has made, to pay the debt and accruing interest until he can send an agent to take possession of the property, which is done. If Mr. Stine was not distrustful of the regularity and legality of the proceedings under the deed of trust, why such haste to get possession of the premises?

Was the notice given in this case, by the trustee, of the intended sale of the property, to satisfy the debt intended to be secured by the deed of trust, sufficient? In default of payment as stipulated in the deed,



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*Stine vs. Wilkson and others.*

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the trustee was to "proceed to sell said land and premises at public auction for cash to the highest bidder, at the Court House door in St. Louis, first having given twenty days previous notice of the time and place and terms of sale, and property to be sold, by advertisement in some newspaper printed in the city of St. Louis."

It appears from the evidence of Messrs. Allen and Holbrook, that the first publication was made on the 11th March, and in the Evening Gazette, and then transferred to, and published in the Atlas on the 14th, 21st and 28th March. The sale took place on the 1st April then following. If the publication in the Evening Gazette be excluded from the computation of time, then the notice was not published *twenty days previous* to the day of sale and continued as is directed by the deed of trust. But it was contended by the counsel for Stine that one publication of the notice would satisfy the requisition in the deed, and that one having been made in due time, in the Gazette, the after notice published in the Atlas might be rejected. The deed of trust does not specify particularly the number of times when the notice shall be published, but enough can be collected from that instrument which, when taken in connection with the acts of Stine the defendant, show what must have been the intention of the parties. The language used in the deed on this subject is substantially the same as that used in our statute directing how a Sheriff shall give notice of a sale of real estate under execution. Would one publication of a notice by a Sheriff of an intended sale of real estate under execution, made in a newspaper twenty days before the day of sale, be held to be a compliance with the requisition of the statute, which directs him to give twenty days previous notice of the time, &c., by advertisement in some newspaper printed in the county, &c? We apprehend that such is not the general understanding, nor the practice in the country—but that such notices *are continued to be published* until the day of sale.

The first publication of notice was made as before stated on the 11th March, in the Gazette. Why was it afterwards continued in the Atlas, if Mr. Stine believed the one insertion to be sufficient? The continuation of the publication up to the day of sale, shows that Stine, at least, who controlled that matter, thought it then necessary. Let us see what would most probably be the consequences of tolerating one publication in the Gazette as a compliance with the requirement in the deed of trust. Twenty days prior to the day of sale, a notice appears in the Evening Gazette, stating that certain property therein described will be sold at a time and place therein named, for the purpose of satisfying a debt due

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*Clemens vs. Wilkinson.*

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to Stine from McKinder, &c. This notice is seen and read by the readers of the Gazette, on the week of its publication,—the next week on examination of the Gazette, it is ascertained that the notice has been withdrawn. This withdrawal would authorize the conclusion that some adjustment of the matter had taken place between the parties, and that no sale would be made of the property. If this be so, then the manner of giving the notice, and its transfer, were deceptive and well calculated to mislead the public mind, and prejudice the rights of McKinder and his creditors, and, in this point of view, was highly objectionable. If one publication of the notice, made at least twenty days prior to the day fixed for the sale was sufficient, what would forbid the giving of that notice thirty, sixty, or ninety days before the day of sale: and yet such a notice would be unquestionably bad.

The length of time when the notice was to be given, prior to the day of sale being fixed by the parties, shows that the intermediate time was intended to be occupied by such notice:—was this done by the subsequent insertion and continuance of the notice in the Atlas? It is said that the Gazette and Atlas are the same paper, whilst the proprietors disclose facts which show that so far at least as this question is involved, the subsequent publication of the notice of the sale in the Atlas might with as much propriety have been made in any other weekly newspaper published in the city of St. Louis. They say that the Evening Gazette is a daily commercial paper, intended, and in fact confined in its circulation to the city, whilst the Atlas is a weekly paper, for country circulation, and having scarcely any patronage in the city.

Other points were presented in the case which we do not now undertake to decide, as the one discussed by us is conclusive of this case. We are then of opinion that the Circuit Court committed no error in its decree made herein, and Judge Scott concurring, the decree of the Circuit Court of St. Louis county is affirmed.

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*CLEMENS vs. WILKINSON.*

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As to judgments rendered prior to the act of 1835, R. C. p. 396, the presumption of payment after twenty years, raised by the common law, continues unaffected by that act. That act, as to such judgments, is only cumulative.

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*Clemens vs. Wilkinson.*

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## ERROR to St. Louis Circuit Court.

*GAMBLE & BATES for Plaintiff in Error.*

The act of 1835, Revised Code p. 396, purports to establish the rule of presumption as to judgments rendered before it took effect. To say that the common law rule still remained, unaffected by the act, is to leave the part of the act relating to past judgments altogether nugatory. This, it will be remembered, is a mere rule of evidence, not a limitation of right, or of remedy, and is not, in the different countries and States in which it is recognized, uniform in the length of time required to raise the presumption, or in the circumstances which will rebut it. The statute was designed to fix a rule which should cover the whole ground, and being fixed, it is the only rule in operation.

*GANTT, for Defendant in Error, contended:*

The record presents but one question, "Is the act of 1835 a repeal of the common law, or is it merely cumulative?" Page 396, Revised Code, 1835. The defendant in error, by her counsel, submits that it is not a repeal of the common law; and that Mr. Spalding decided the question submitted correctly. He refers to the following authorities as elucidating this point: *Scidmore vs. Smith*, 13 John. Rep. 322; *Abny vs. Haines*, 5 J. R. 175; *Farmer's Turnpike Company vs. Coventry*, 10 John. Rep. 389. The principle is too familiar to need labored reference to authorities.

*SCOTT, J., delivered the opinion of the Court.*

This was an action originally commenced in the St. Louis Probate Court, by James Clemens vs. the defendant in error, on a judgment obtained against Wilkinson, in his life time. The judgment was dated April 25th, 1821. The date of the notice to the executor, defendant in error, of the intention of the plaintiff in error to present his demand for allowance, is May 27, 1842. The testator died in September, 1841. The case was afterwards taken to the Circuit Court; the defence was payment. No evidence was preserved, in consequence of an agreement of the parties that the cause depended on the solution of the following question: Whether the statute of limitations, art. 4, sec. 1, page 396, Revised Code of 1835, annuls the bar created by the lapse of time, and removes the common law presumption of payment thence arising, and renders the lapse of twenty years from the date of that act necessary to raise the presumption of payment, which it is admitted would have attached to this demand but for that statute, or is that act merely cumulative? Judgment was given for the defendant in error.

*Clemens vs. Wilkinson.*

Some statutes, from their being in affirmative terms, are called affirmative statutes; others are called negative, because they are penned in negative terms. It is a maxim of law that an affirmative statute does not take away the common law. 2 Int. 200. Thus, in the case of Jackson vs. Bradt, 2 Cain 169, it was held that if a statute without any negative words declare that deeds should have, in evidence, a certain effect, provided particular requisites are complied with, this does not prevent their being used as evidence, though the requisites are not complied with, in the same manner as they might have been before the statute passed. So in Foster's case, 11 Rep. 64 *a*, it was observed that in many cases the designation of a new person, in a latter act of parliament, should not exclude another person who was authorized to do the same by a precedent act. So it is held that statutes must be construed in reference to the common law. In the case of Smith's ex. vs. Miller, 14 Wend. 190, the Court seems to have been of opinion that at common law there was no presumption of payment, or satisfaction of a judgment after the lapse of twenty years from its rendition. That such presumptions only arose in actions on sealed instruments, and that the presumption of payment of a judgment after a lapse of twenty years, was a creation of their statute which is similar to ours. Judge Cowen, however, is of a different opinion, and in his notes on Philips, 1 vol. 324, cites many authorities in support of the contrary opinion. Tidd's Practice 17, 18, denies the doctrine of the Court. In some of the States the Courts also maintain the contrary. Boardman vs. De Forest, 5 Conn.; Kennedy vs. De Norris, Ex'r., 2 Const. S. C. Rep.; Herndon's Ex. vs. Barton's Ex., 7 Mon. 449.

In this case the parties have admitted that the presumption did exist at common law, and the only question is whether it is taken away as to judgments rendered prior to the taking effect of the act of 1835, before cited. If, as has been attempted to be shown, that the presumption did exist at common law, there must be some good reason why the legislature would extend it in case of such judgments,—five, ten, fifteen, twenty, forty years,—when by the very act by which it is contended this is done, so far from showing any dissatisfaction with the rule of the common law, in case of judgments rendered subsequent to the taking effect of the act, it is made more stringent and more difficult to be rebutted than it was before. If a judgment had been rendered forty years before the taking effect of the act of 1835, and the common law had raised the presumption of payment, can we believe the legislature intended that in all such cases twenty years more should elapse before such presumption should arise?

*Matson vs. Field & Cathcart.*

There is no reason for such discrimination between judgments rendered at different periods. The principles of construction above stated are amply sufficient to bear us out in the opinion that the common law, as to judgments rendered prior to the taking effect of the act of 1835, is not repealed. That as to these judgments the statute is cumulative; that after twenty years from their rendition they will be presumed to be satisfied; which presumption may be rebutted by the circumstances deemed sufficient at common law, as well as in the manner pointed out by the statute.

The other Judges concurring, the judgment will be affirmed.



**MATSON vs. FIELD & CATHCART.**

1. A Court of equity will not interfere by injunction to restrain a judgment at law, for causes which on a motion for a new trial at law had been held insufficient.
2. The neglect of a party to make his defence at law, is no ground for equity to interfere.

**APPEAL from St. Louis Circuit Court, (in Chancery.)**

**HOLT & BEATTY, for Appellant, contended:**

1. Equity will not relieve against the inattention of parties in a Court of law, as by neglecting a proper defence, or to move for a new trial in proper time. 1 Mad. Chan. 77; Whea. 14; Ves. 28, and 1 Chan. Cas. 43, are referred to. See also Barker vs. Elkins, 1 John. Chan. Rep. 466.
2. No distinction can be made between the negligence of a party, and that of his attorney. Field & Cathcart vs. Matson, 8 Mo. Rep. 687.
3. On motion for a new trial, due diligence must be shown. Wimer vs. Morris, 7 Mo. Rep. 6; Green vs. Goodloe, 7 Mo. Rep. 27. The rule is the same at law and in equity. Woodsworth vs. Van Buskirk, 1st John. Chan. Rep. 432.
4. Eliza P. Grimes and her children, ought to have been made parties to this suit, the rule in equity being that all interested in the subject matter must be parties. Story Eq. Pl. 74; Mitford's Eq. Pl. 163-4.
5. Even if the complainants have made out a case for the interference of chancery, yet the decree of the Circuit Court goes too far. The Court ought, at most, to have ordered a new trial at law, and not have made a perpetual injunction.



*Matson vs. Field & Cathcart.***LESLIE & LORD for Defendants.**

1. Equity will relieve against a judgment obtained by accident, where there is no negligence or default of the party against whom it is rendered. *Andrews vs. Fenter*, 1 Ark. Rep. 186; *Kincaid vs. Cunningham*, 2 Munford 1. In *Forshea & Sea*, 4 Call. 279, it is said "a Court of equity will relieve when the common law gives no remedy, or judgment has been obtained by surprise or inadvertence." In *Click vs. Gillespie*, 4 Haywood 7, it is said, "in Tennessee the Courts of Chancery will grant relief to a defendant when he has a good defence at law, but by some mistake of his counsel was prevented from availing himself of it." See also *Tucker's Commentaries*, vol. 2, p. 472, 475, 476, and 477, and the cases there cited. 4 Mun. 469; 6 ib. 291; 2 Wash. 41.

2. The Circuit Court did not err in refusing to let *Eliza P. Grimes* in to answer.

3. The decree is regular under the rules and practice of the Courts of Chancery of this State. See *Practice in Chancery R. S.* It is said in the English books of practice, "if the defendant makes default by not appearing, &c., &c., plaintiff is entitled to a decree nisi, to become absolute at the next term," &c. Now this is precisely the decree meant by our statute; the giving it a new name will not effect it—it is a decree nisi in its nature and effect. *Smith's Chan. Pr.* vol. 1, p. 416. "An interlocutory decree is properly a decree pronounced for ascertaining matter of fact, or law, preparatory to a final decree," &c. *Seaton's Decrees*, p. 2; 1 *Hoffman Chan. Pr.* 501; 1 *Barbour's Pr.* 326; *Kane vs. Whittick*, 8 *Wendall* 224. Section 12, of article 2, of the act concerning *Practice in Chancery, R. S.*, p. 841, provides, "if they (demurrers) are overruled the defendants shall pay costs, and shall file his answer *instantly*, or in default thereof so much of the bill as remains unanswered shall be taken as confessed."

4. The plaintiff in the judgment in the common pleas, *James S. Matson*, was the only proper party to the bill as defendant.

**SCOTT, J., delivered the opinion of the Court.**

This is the case reported in the 8th Mo. Rep. 686, of *Field & Cathcart vs. Matson*. After the judgment against *Field and Cathcart* had been affirmed in this Court, they on the very same grounds which are reported in the said case, and on which they in the first instance applied to the Court of Common Pleas to set aside the judgment and grant a new trial, by a bill in equity, applied to the Circuit Court of St. Louis county, for a perpetual injunction restraining all proceedings by *Matson* under his judgment against *Field and Cathcart*. The bill was demurred to for the want of equity, and the demurrer was overruled. The defendant, *Matson*, failing to answer, a decree was entered against him perpetually restraining him from enforcing his judgment against *Field and Cathcart*.

If the Circuit Court had barely granted a new trial, there would have been some semblance of justice, if not of law, in its proceedings. But by perpetually restraining *Matson* from the use of his judgment, he was sent away without redress, totally unheard. A plaintiff brings an action at law against a defendant, he takes a judgment by default, which is matured into a final judgment. An application is made to set aside the default, and grant a new trial. The motion is overruled, and the judg-

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*Matson vs. Field & Cathcart.*

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ment overruling that motion is affirmed in the Supreme Court. Afterwards the defendant, on no other grounds than those on which he applied for relief to the Courts of law, goes into equity and obtains a perpetual injunction to the judgment. The bare statement of this case, is sufficient to show how irreconcilable it is to all principle. As there had been no trial at law on the merits, it is obvious that if a Court of equity interfered at all, it should have again permitted a litigation of the rights of the parties in a Court of law.

In what a situation is this Court placed by this proceeding. This question has once been determined here, and now upon the very same grounds upon which it has once been decided, we are called upon to decide it again. *Inter est reipublicæ ut sit finis litium.*

But no principle is clearer than that a Court of equity had no authority to interfere in this case. Various cases have been cited from the Virginia Reports in order to warrant the exercise of the power assumed by the Circuit Court; and Tucker's Commentaries have also been relied on in support of this decree. Tucker, after a lucid review of the cases in which new trials had been granted in equity after a judgment at law, concludes by saying, "it will have been observed from the cases heretofore cited, that the interference of a Court of equity in granting a new trial, arises only from the inability of the party to make his application to a Court of law; for if he has made it, and it has been refused, it cannot be successfully renewed in equity on the *same* ground; and if he has failed to make it, when he might have done so, he is entitled to no relief. That it is obvious that a Court of equity substitutes itself for a Court of law, and in all such applications the Court of equity should adopt the principles and rules of the Court for which it is substituted." In the case of *Bateman vs. Welloe*, 1 Schoale's and Lefroy's Rep. 201, when an injunction was applied for, on the ground that the plaintiff's demand was unconscientious, and where a verdict had been obtained against a defendant who had neglected to apply for a new trial within the time appointed by the rules of the Court of law, Lord Redesdale observed, "it is not sufficient to show that injustice had been done, but that it has been done under circumstances which authorize the Court to interfere; because if a matter has already been investigated in a Court of justice, according to the common and ordinary rules of investigation, a Court of equity cannot take on itself to enter into it again. The inattention of parties in a Court of law can scarcely be made a subject for the interference for a Court of equity. Unless a verdict has been obtained by fraud, or a party has possessed himself improperly of something by means of which

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*Black vs. Paul.*


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he has an unconscientious advantage at law, which equity will either put out of the way or prevent him from using, equity does not interfere to grant a trial of a matter which has already been discussed in a Court of law, a matter capable of being discussed there, and over which the Court of law had full jurisdiction." So in the case of *Simpson vs. Hart*, 1 John. Chan. Rep. 97, Chancellor Kent held, "that where Courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than Courts of law, in a similar case, could re-examine a decree in the Court of Chancery.

That the principle that a matter once considered and decided by a competent tribunal, shall not be reviewed by any other tribunal having concurrent power except in the regular course of error or appeal, does not rest on the mere technical form of the decision. It is the unfitness and vexation and indecorum of permitting a party to go on successively, by way of experiment, from one concurrent tribunal to another, and thus introduce conflicting decisions. The principles of this case were fully acknowledged on an appeal in the Court of errors, although the decree on other grounds was reversed. Judge NAPTON concurring, the decree is reversed and the bill dismissed.

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 BLACK vs. PAUL.
 

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An answer of a garnishee admitting that he had been indebted to A., but that before he was summoned, by an agreement between himself, A. and B., a creditor of A., the debt was to be paid to B., is evidence in his favor to shew that he is not indebted to A.

### ERROR to St. Louis Court of Common Pleas.

#### *HAMILTON, for Plaintiff in Error, contended:*

1. The arrangement set up in the answer having been put in issue, should have been proved by the garnishee. In the case of *Davis vs. Knapp & Shea*, this Court merely decided, that the answer of the garnishee, as to the extent of his alleged indebtedness, shall be presumed true, and operate to discharge him from liability, unless disproved. This is in conformity with the rule in Chancery, that where the matter in issue is referred by one of the parties to the oath of the other, such oath, though in favor of the deponent himself, is decisive of the point. In the decision referred to, it was not designed, as it is imagined, to adopt the rule itself, without its acknowledged exceptions, by allowing the answer to be conclusive as to extrinsic matter, that which is merely in avoidance, and growing out of a distinct transaction, or to enable the garnishee by his oath to

*Black vs. Paul.*

swear title into a third party. Hoffman's Ch. Pr. 78, 79, 80, and cases cited. Where the answer denies or admits the facts stated, but sets up other facts in defence or avoidance, the answer is no proof whatever of the facts stated, but they must be proved by independent testimony. 2 Story's Equity, 915. Ashby vs. Watson, 9 Mo. 237. The answer is not to receive a different construction from what it would in a suit in Chancery. 5 Mason, 281.

2. The answer showed no title to the fund in Page. 3 B. & C., 501. 4 ib. 163. 5 D. & R., 417. 7 N. H., 345. Ib. 397, and cases there cited. Chitty on Contracts, 612—13—14.

3. The garnishee submits the question of title on the facts stated by him in his answer to the Court. Taking the answer as true, or if the same facts set out had been proven by the defendant in the execution, we were entitled to our judgment for the amount in the hands of the garnishee, under our motion. 3 Ala. New Series, 312. Ib. 1, 315. The discharge of the garnishee was without any foundation in the law or the facts of the case.

*SPALDING & TIFFANY for Defendant in Error:*

1. The answer of the garnishee was evidence of the agreement therein stated, to pay the balance owed by the garnishee to D. D. Page, and therefore the first instruction asked by the plaintiff was properly refused. 8 Mo. Rep., 657. Davis vs. Knapp & Shea, 9 Mo. Rep., 48, case of Knapp & Shea cited and confirmed.

2. The Court properly refused to give the second instruction, as it was erroneous in the following particulars, viz:

1st. In requiring to be *expressly* proved, that by the arrangement the debt due by Paul to Baird was extinguished, &c., it being clearly legal to prove that fact by *implication*, or by *circumstantial evidence*.

2nd. In requiring the agreement of Page to accept Paul only as his debtor to be *express*, and that it should be proved to have been *express*.

3rd. In requiring it to be proved that Page by *express* agreement accepted Paul, and *him only*, as his debtor, whereas if the agreement was fully proved as set forth, and if Page agreed to discharge Baird, the consequence would follow that Paul was his only debtor, and it needed no *express* agreement.

4th. Because the agreement mutually among the three, Paul, Baird and Page, that Paul should pay to Page, was valid, being in consideration of mutual promises; and as the debt was merely a *parol* contract, and as before it was due, or the work done, the agreement was made, the debt, if it did accrue, accrued to Page. 1 Phillips Ev. 563.; that *parol* agreement before breach can be discharged by *parol*. 4 N. H. Reps., 196. 1 Cowen, 345. 7 N. H. Reports, 397—345. 1 Miss. Rep., 556.

3. The motion to give judgment against the garnishee, was rightly overruled, or if it were not, the action of the Court in relation thereto, cannot be impeached, as it was not excepted to. The bill of exceptions states that it was *overruled*, and that plaintiff *excepts*:—excepting at the time the bill of exceptions is signed will not do, unless it should appear that the bill of exceptions was signed on the spot, when the motion was overruled, and before anything further was done.

*SCOTT, J., delivered the opinion of the Court.*

Paul was served with a garnishment on an execution, by Black, who had obtained judgment against Baird. To the usual interrogatories he responded, that Baird, the defendant in the execution, agreed to put up for him a balcony, for which he had paid him \$300 in advance, and that

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he refused to pay any more until the work was completed. That Baird then told him that he was indebted to D. D. Page, and that Page was pressing him. Paul, the garnishee, then offered to pay Page any balance that might be due, when the balcony was finished, which was agreed to and desired by Baird. Thereupon, long before Paul was summoned as a garnishee, at the request of Baird, he agreed with Page to pay him the balance that would be due when the work was done. That after the balcony was finished, and before he settled with Page, he was garnisheed at the suit of Black. In an amended answer, Paul states that it was expressly agreed among the three, Page, Baird and himself, that he should pay any balance he might owe Baird, to Page. Black denies so much of Page's answer as asserts the existence of any agreement among Page, Baird and Paul, relative to the payment of the balance.

Black asked the following instructions, which were refused, viz :

I. The answer of said garnishee setting up an arrangement by which Page was to receive the balance admitted to be due Baird by said Paul the garnishee, is not of itself evidence of such an arrangement, entitling Page to receive the money; and unless such an arrangement be proved and established by said garnishee, the plaintiff is entitled to judgment against the garnishee.

II. The answer of said garnishee setting up an arrangement by which Page was to receive the balance admitted to be due Baird by said Paul the garnishee, is not sufficient to exonerate and discharge said garnishee in this proceeding, unless it is expressly proved by said garnishee that so much of the debt as was originally due by him to said Baird, should be, and was extinguished by the new arrangement; and that such extinguishment does not take place unless the garnishee proves that there was communication between all the parties, to-wit: the garnishee, defendant, and Page, and an express agreement by said Page to accept the said Paul, and him only, as his debtor for the amount of the said balance. There was a verdict and judgment for Paul the garnishee.

It has been repeatedly decided by this Court that the answer of a garnishee is evidence. *Davis vs. Knapp & Shea*, 8 Mo. Rep., 657. *Gwathmey vs. Stevens*, 9 Mo. Rep., 640. The principle of equity law which has been urged by the plaintiff in error, that where a party admits an indebtedness, his answer setting up facts in avoidance of it is not admissible, has no application to this case. Paul is asked if he is indebted to Baird, he answers in the negative, and shows the reasons for his answer. He does not seek to avoid any indebtedness on his part. He acknowledges that he owes the debt, and only wishes to know to



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whom it is to be paid. It is a matter of indifference to him to whom it is paid. Black has called on him to answer; under oath he has done so, and it would be strange that no respect should be paid to what he says. He is a competent witness between these parties, for he stands indifferent between them. Suppose Paul in his answer had failed to state the agreement by which he had become pay-master to Page, and Baird had recovered his debt from him, would not Paul have had an action against him on their contract? *St. Louis Perpetual Insurance Company vs. Cohen.* 9 Mo. Rep., 442.

In the case of *Tatlock vs. Harris*, 3 D. & E., 180, Buller says, "if A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover that sum against A. This principle has been repeatedly recognized. 7 N. H. Rep., 395. *Heaton vs. Augier.* *Wilson vs. Coupland*, 7 E. C. L. Rep., 77. *Wharton vs. Walker*, 10 E. C. L. Rep., 303.

It follows, then, that there was no error in refusing the instructions asked by Black, and Judge NAPTON concurring, the judgment is affirmed.

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MERRICK & WEBSTER vs. GREELY & GALE.

1. An amendment of the statement of the cause of action, in a proceeding against a boat, which does not change the cause of action, will not release the securities in the bond given to release the boat.
2. The securities are bound to take notice of the amendment.

APPEAL from the St. Louis Court of Common Pleas.

*TODD, for Appellants, contended:*

1st. The liability of securities is *strictissimi juris*, and never to be extended; any change by a creditor, discharges the sureties of his debtor, even though such change be for the benefit of the sureties. 10 J. R. p. 180, *Myers vs. Edge*; 7 Term Rep. p. 250; 9 Bing. 400; 8 Wend. Rep. 516; *Ludlow vs. Simond*, 2 Caine's Cases p. 1, 29, and 30. This amendment would discharge bail. *Lake vs. Silk*, 3 Bing. 297; *Manesty vs. Stevens*, 9 Bing. 400-4; Hals. R. 97; *Theobald on Surety and Agency*, p. 155; 1 Pick. Rep. p. 452; 17 Mass. Rep. p. 591-603.

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2d. The demand of the amended complaint, is different from and is a change of the demand of the original complaint; in the one case it is the personal debt of A. Osburn; in the other, not.

3d. The 2d section of the act supplementary to the act concerning boats and vessels, passed February 12, 1839, and to be found on page 13 of the Laws of 1838-9, under which judgment in this case was rendered, is violative of the constitution of Missouri, and of the United States, sec. 8, of art. 13 of Constitution of Missouri; art. 5 and 7 of Amendments of the Constitution of the United States; 4 Monroe Rep. p. 42; 2 Pet. R. 492 and 525; 1 Howard's Miss. Rep. p. 102 and 105; 3 do. p. 62, 65. The sureties cannot come in and defend, §7 R. C. 1835, p. 103.

This is a suit at common law, as is every suit brought in a court of common law, and governed by its rules of practice. 1 Mo. Rep. p. 172 of new publication; 3 Pet. Rep. 446-7. Again, the obligation of these securities is of a common law character, it being under an instrument of common law nature, validity, interpretation and effect.

Also, it is contrary to every principle of justice that a judgment should be rendered against a party not in Court. Caldwell vs. Lockridge, 9 Mo. Rep. 362. A party is entitled to a day in Court, as the old phrase has it, before he can be made a subject of its judgments. He cannot be deprived of his property, or liberty, save by due course of law. Art. 5 of Amendments to the Constitution of U. States.

*FIELD, for the Appellees, contended:*

1. That supposing the amendment material, it did not change the cause of action so as to discharge the sureties. See Ball vs. Claflin, 5 Pick. 303; Miller vs. Clark, 8 ib. 412; Lord vs. Clark, 14 ib. 224; Hinershoff vs. Miller, 2 J. R. 295.

See also as to amendments in general, 10 N. H. Rep. 438, particularly opinion of Parker, C. J. It will be observed that defendant went to trial on particulars furnished under old declaration.

2. That the amendment was wholly immaterial, and the statement of any person on whose account this demand accrued, was mere surplusage. Compare the boat law of 1835, §1 and 4, with the law as amended in 1839, and particularly the phraseology of 3d subdivision of §1 of the law of 1839.

*SCOTT, J., delivered the opinion of the Court.*

Greely & Gale filed a complaint under the statute concerning boats and vessels, against the steamboat Mound City, for materials furnished. Merrick & Webster became the surities in the bond given by the agent of the boat, conditioned to satisfy the amount which should be adjudged to be owing and due to the plaintiffs.

The statement of the cause of action filed at the commencement of the suit, averred that the materials were furnished on account of A. Osburn, who was described as "*a part owner and husband of said boat.*" At a subsequent term, leave was obtained to amend the complaint of the plaintiffs, by striking out the words above, descriptive of the person at whose instance the materials were furnished, and inserting in lieu thereof, "*Agent of the owners of said boat.*" On the trial there was a verdict and judgment for the plaintiffs against the boat, and judgment was also

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*Crane vs. Daggett, et al.*

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entered against the sureties. On account of the above amendment, and for want of notice of the proceedings, the sureties contended that they were discharged, and the Court having overruled a motion discharging them, they appealed to this Court.

We do not see how the amendment affected the securities. No new cause of action was introduced by it. The bill of particulars in the cause was not at all changed. Their liability to the plaintiffs was not in any wise varied by it. Nor was any contract that might be existing between the securities, and those at whose instance they entered into it, affected by the amendment. The amendment was purely formal, not varying the recovery, and we are utterly at a loss to see how it injured the appellants.

The appellants had a right to make an amendment, and if it is made without injury to the securities, on what ground can they complain. The principles on which amendments in cases like the present are allowed, are clearly stated in the cases of *Seely vs. Brown*, 14 Pick. 177, and *Ball vs. Claflin*, 5 Pick. 303. These cases maintain that when no new cause of action is introduced by an amendment, and the liability of bail is not affected by it, it is always allowable.

There is nothing in the objection that the plaintiffs had no notice of the proceeding. The suit had been commenced when they entered into the bond; and binding themselves to pay the money which might be adjudged to the plaintiffs, they had all the notice that could be reasonably required; and under the circumstances the statute must have contemplated that they should take notice of the proceedings.

The other Judges concurring, the judgment will be affirmed.

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CRANE vs. DAGGETT, ET. AL.

Where a party submits to a non-suit, and makes no motion to set it aside, the Supreme Court will not look into the case.

APPEAL from St. Louis Court of Common Pleas.

SCOTT, J., delivered the opinion of the Court.

In this case the plaintiff having submitted to a non-suit, and not having

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*Greene vs. Chickering & McKay.*


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moved to set it aside, the merits of the controversy cannot be enquired into in this Court. *Robbins vs. Stephenson & Hord*, 5 Mo. Rep., 105.

Judge NAPTON concurring, the judgment will be affirmed.

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GREENE vs. CHICKERING & MCKAY.

1. A deposition taken by one party to a suit, when filed, may be read by the other, in evidence; and any objection to such deposition which the party against whom the deposition was taken, would be bound to make before trial, must equally be made by the party taking the same, if he object to its reading.
2. The declarations of an agent at the time of selling property, tending to shew that he claimed and sold the property as his own, are competent evidence on behalf of a purchaser from such agent, to shew the title in such agent—and the purchaser will be entitled to set off any debt due him from such agent.
3. Such defence may be made under the general issue.

APPEAL from the St. Louis Circuit Court.

*FIELD for Appellant.*

I. As to the exclusion of Floyd's deposition. This deposition was taken on the part of the plaintiffs. Both parties appeared at the examination, and no objection was made on either side to the commission, nor was any objection taken afterwards, till the moment when the deposition was offered on the trial.

1st. The action of the parties under the commission, was a waiver of its irregularity. *Dawson vs. Tibbs*, 4 Yeates' Rep., 349. In that case the commission issued without an order of Court, but the parties had acted under it, and the Court held the irregularity waived. See also *Hall vs. Lay*, 2 Ala. Rep., 529.

2nd. Particularly, the plaintiffs who sued out the commission, ought not to be allowed to set up an irregularity in it, to exclude testimony taken by themselves under it.

3rd. The rule of the Court required the objection to be taken before the trial. The object of the rule was to prevent surprise, and this object was wholly defeated by the decision of the Court.

4th. The case was such, that the defendant must of necessity have been surprised in fact;—and a verdict obtained in that way on incompetent evidence, ought to have been set aside.

That the agent under the circumstances disclosed in Floyd's deposition, was not a competent witness. See *Theobald's Prin'l and Agt.*, 320.

II. As to the exclusion of evidence of Trenchery's declarations.

The defendant claimed the benefit of a set off against Trenchery, and to let in this defence, he offered to shew that Trenchery held himself out as principal, and in fact declared that while the pianos were in his possession, that he was owner.

If an agent hold himself out to the world as principal, persons dealing with him may set off

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*Greene vs. Chickering & McKay.*


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claims against him, in the same manner as if he were the principal in fact. Story Ag. 431—2. Theobald's Prin'l and Agt., 307. And this defence is proper under the general issue. 1st Chit. Pl. 570, and cases there cited. The declarations of the agent to the effect, that he was principal were really the foundation of the defence. Besides, it is a general rule, that declarations accompanying possession and explaining it are always admissible. 3rd Phil Ev. (Cow. Ed.) 597 to 603, where the cases are collected and compared. See also 4 Mo. Rep., 18, to the same effect.

*SPALDING & TIFFANY for Appellees, rely on the following*

POINTS AND AUTHORITIES :

The deposition of Floyd was properly excluded, as there was no dedimus under which it was taken; and as it was taken on behalf of plaintiff below, appellee here, it did not when offered by the other party, come within the rule of Court, requiring exceptions to be filed, nor if it did, was this such matter as was required to be excepted to.

1. Rev. Code 1835, p. 250, §3, and p. 221, §19, and p. 222, §21. The case cited from Tate's Rep. by opposite counsel I have not seen. The case in 2 Alabama Rep. 529, is different from this. There was a written consent of the counsel; besides, there was a seal in that case.

2. The hearsay! statements of Trenchery, the witness of plaintiff, which was offered by defendant below, was rightly excluded:—

1st. Because it was hearsay.

2nd. Because if it was intended to impeach Trenchery, or lessen the weight of his testimony, a proper foundation had not been laid, by previously questioning Trenchery on cross examination. 4 Mo. Rep. 256. Roscoe on Ev., 140—1, &c. Greenleaf's Ev., 514, §462. 1 Stark Ev., 182—3—4. 1st Phillip's Ev., 293—4. 7 Mo. Rep., 120. Abell et. al. vs. Shields et. al. These authorities show that a witness cannot be proved to have made contradictory statements, unless a foundation be laid by first asking him in relation thereto.

3rd. Because no set off was pleaded, nor any notice filed of one, so that all evidence tending to prove set off was irrelevant, and this evidence was admissible on no other ground than to impeach Trenchery, or to establish a set off. Rev. Code of 1835, p. 579, § 1, 2 and 3.

3. The Court cannot take notice of this last point, as the record does not show when this bill of exceptions was filed, and it states that the defendant below "*excepts*" to the decision of the Court,—*excepting then when it was filed*, is not the exception contemplated by the Act of Assembly, but, *excepting at the time the decision was made*. And the burden is on the party complaining, to show that error was committed against him. 8 Mo. Rep., 136—224 and 234. 9 Mo. Rep., 797, Turner vs. Belden.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of assumpsit against Greene, the appellant, to recover the value of a piano forte. Plea—Non assumpsit. Verdict and judgment for the appellees—plaintiffs.

On the trial, Trenchery's deposition was read for the plaintiffs, which proved that Trenchery was agent for the plaintiffs for selling piano fortes, of which they were the manufacturers, and that one was sold to the defendant for the sum of \$350, which remained unpaid. Another witness testified to the agency of Trenchery, and the sale to Greene.



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*Greene vs. Chickering & McKay.*

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To the reading of Trenchery's deposition, the defendant objected on the ground that he was interested, and to establish his interest, he offered to read the deposition of one Floyd, to the reading of which the plaintiffs objected, for the reason that the commission under which it was taken was not under the seal of the Court from which it issued. This deposition was taken by the plaintiffs themselves. There is a rule of the Circuit Court of St. Louis county, which says that no exception to a deposition, saving to the competency or relevancy of the testimony therein contained, shall be allowed unless the exception be filed in writing before the trial of the cause wherein the deposition was taken, provided the deposition is filed two days before the trial. This deposition had been filed more than two days before the trial.

The defendant stated that his defence was, that Trenchery, the agent, held himself out as the owner of the piano whilst it was in his possession; that he purchased it, believing in good faith that he was the owner of it, and that he was a creditor of Trenchery's for \$300 and more; and was examining a witness in relation to the declarations of Trenchery whilst he was in possession of the piano to show that he held himself out as owner, when the declarations were excluded by the Court, to which an exception was taken.

The authorities seem to incline to the opinion that a deposition taken by one party to a cause, may be used by the other, notwithstanding it is not read by him at whose instance it was taken. *Yeaton vs. Fry*, 5 Cr. 335. 4 *Bibb*, 480. *Gordon & Walker vs. Little*, 8 Serg. & Rawl., 535. If, then, after a deposition is filed in a cause, the parties are equally entitled to the use of it, it would seem to follow from the rule of Court above stated, that if the objection taken by the plaintiffs to the deposition of Floyd, could be taken by them at all, it was not taken in time. After the deposition was filed, it was the defendant's deposition, and the plaintiffs should have objected to the manner of taking it within the time prescribed by the rule of Court. If a party were permitted to take advantage of his own irregularity, in taking a deposition in order to suppress it, it does seem it would enable him in many cases to entrap his adversary.

As it regards the exclusion of the declarations of Trenchery, respecting the ownership of the piano, it may be remarked, that such declarations do not fall within the rule which prohibits a party from making evidence for himself by his own assertions. The object of the proof of the declarations of Trenchery, seems to have been to enable the defendant to avail himself of the principle of law, that if a factor sell goods

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*Clamorgan vs. O'Fallon & Lindell.*

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of his principal in his own name, without any notice on the part of the purchaser that the goods are not his own, the purchaser will be entitled to set off a debt due to him from the factor against the price of the goods. *George vs. Cleggett*, 7 D. & E., 359. *Rabone vs. Williams*, *ib.* *Carr vs. Hencliff*, 4 Barn. & Cres., 547. Story on Agency, §390.

The case of *Carr vs. Hencliff*, 4 Barn. & Cres., 547, is an authority to show that the defence set up by the defendant was available under the general issue.

Judge NAPTON concurring, the judgment will be reversed, and the cause remanded.

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CLAMORGAN vs. O'FALLON & LINDELL.

Where land sold by a sheriff has been subsequently conveyed by the purchaser at the sheriff's sale, all persons claiming title under the sheriff's sale must be notified of a motion to set aside such sale. It is not sufficient to notify the purchasers from the sheriff.

APPEAL from St. Louis Circuit Court.

CROCKETT & BRIGGS, for Appellant, contend:

1st. That in a sale by sheriff under execution, if property of defendant be levied upon and sold without the direction or interference of plaintiff, and the plaintiff's demand is satisfied by the sale, upon a motion afterwards by defendant to set aside the sheriff's sale for irregularity, it is not necessary to notify the plaintiff in execution of the motion. 4 Litt. Rep. 244; 4 Mon. Rep. 465, 474.

2d. That upon a motion to set aside a sheriff's sale, if the purchaser, subsequent to his purchase, has sold a portion of the land to other persons, those persons need not be notified of the motion.

3d. That the purchaser of real estate at sheriff's sale, yet remaining in possession of a portion of the land claiming title under his purchase, cannot object that his vendees of a portion of the land have not been notified of a motion to set aside the sale. *January vs. Bradford*, 4 Bibb. 566.

4th. That the motion to set aside the sheriff's sale is not barred by lapse of time, the sale having been made in 1826, and the motion to set it aside in 1845; that such motion may be made at any time within twenty years, and especially where the plaintiffs in the motion were under disability, as in the present case. 2 Mo. Rep. 228; 7 J. J. Marshall's Rep. 624; 7 John. Rep. 556; 4 Wend. 217; 13 John. Rep. 537; 8 Mo. Rep. 448.

5th. That the execution under which the land was sold having been against the Executors of Jacques Clamorgan, the plaintiffs in this motion, claiming under a devise from J. Clamorgan, are "*pro hac vice*," his representatives, and are therefore not strangers to the record, in such a sense as to defeat the motion. 7 Wend. 83.

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6th. That the sheriff's sale was void, and vested no title in the purchaser. Rev. Code of 1825, 367; 8 Mo. Rep. 448, 177; 7 Mo. Rep. 346; 19 Pick. 539; 6 Mon. 30; 3 Marsh. 619; 2 J. J. Marsh. 36, 68; 3 Mon. 338; 7 J. J. Marshall 624; 1 Dana 185; 3 Dana 235; 5 Dana 277; 4 Cr. 403; 18 John. 362; 6 Wend. 522; 9 Porter Rep. 679; 3 B. Mon. 363.

*GEYER, GAMBLE & SPALDING for Appellees.*

The only point which can now be considered by the Supreme Court, as the decision below, was not upon the merits, is, whether the Circuit Court decided rightly in dismissing the motion, because the parties interested were not notified.

If a decision of the motion is of any use, it must be because it will affect the plaintiff in the execution, or the present owners of the land under the sale, or both. Neither were notified of the motion.

The appellees contend:—

That notice was necessary in this case to all the parties interested in the result of the motion, and should have been given to the plaintiff in the execution, or his representatives, and the present holders under O'Fallon & Lindell.

1 J. J. Marshall 12; Hardin 181; 1 Marsh. 423; 8 Mo. Rep. 367; 1 Wend. 101; 9 Mo. Rep. 362; Caldwell vs. Lockridge, 1 Bibb Rep. 155; 4 Wend. 217; 2 Bay 338, show that it is too late now to go into such a question. In one case in Bibb, Court would not set aside an execution after 9 years, and in the case of Bay, after 12 years.

*Statement of the case adopted by the Court, and opinion by NAPTON, J.*

On the 20th April, 1820, Rufus Easton recovered a judgment in the Circuit Court vs. Jacques Clamorgan's executors, for \$131 debt, and \$28 82-100ths damages, besides costs. On the 10th June, of the same year, he issued execution on said judgment, on which the sheriff returned that he had made by the sale of a tract of land, all the cost and interest, and one hundred and forty-three dollars two and three-fourth cents of the debt and damages. On the back of the advertisement appended to the sheriff's return, the sheriff endorsed that Peter Faysaux had purchased the land at the price of \$169. No other execution issued until the 3d April, 1826, when an alias *fi. fa.* was issued, on which the clerk endorsed the credit of \$143 02 3-4, made on the former execution, leaving a balance due of debt and damages \$16 79 1-4. On this execution the sheriff returned, that he had levied upon the real estate described in the advertisement, a copy of which was returned with the execution; that having duly advertised the same, he sold it at public auction to John O'Fallon and Jesse G. Lindell, the highest bidders therefor, at the price of \$33, which after deducting costs, satisfied the execution and left a surplus of \$5 42, in the hands of the sheriff. The property levied upon is not described in the return, otherwise than by a reference to the adver-

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tisement, in which the real estate is described as follows, to-wit: "A piece or parcel of land containing one arpen in front by forty arpens in depth, and bounded on the eastern end by a fence formerly made to defend the crops of the inhabitants of St. Louis against the animals or beasts; on the north by the land of Tayon; on the western end by the king's domain, or vacant land; and on the south by the highway which leads to the village of St. Charles; it being the same lot of forty arpens acquired by said Clamorgan of Gabriel Dodier, by deed bearing date Nov. 4, 1793, the boundaries as above set forth are the same as given in said deed." On the 10th August, 1826, the sheriff conveyed the said land, by the same description as contained in the advertisement, to the purchasers, O'Fallon and Lindell.

On the 7th June, 1845, Louis Clamorgan, Henry Clamorgan, and Cyprian Clamorgan, (the latter acting by his guardian,) claiming to be the heirs and legal representatives of Jacques Clamorgan, deceased, filed their motion to set aside the sale to O'Fallon and Lindell for the following reasons:—

1st. Because the alias *fi. fa.*, by virtue of which the sale was made, was irregular and void, and had been improvidently issued, the whole amount of debt, damages, interest and costs, having been collected on the first execution.

2d. Because the said alias *fi. fa.* was not in fact levied on the land prior to the sale.

3d. Because the said premises, for many years prior thereto, and at the time of said sale, were divided and laid out into blocks, squares and town lots, visibly divided by streets and alleys, and other marked boundaries, then plainly visible and well known, as well to the sheriff as to O'Fallon and Lindell; that the property was susceptible of a division, and a good part thereof had before then been added to the city of St. Louis, as an addition thereto, by one Jeremiah Conner, and dedicated as such, all of which was known to the sheriff, O'Fallon and Lindell; that the sheriff did not sell or offer to sell it in parcels; but sold the same *in solido*, by reason of which the premises sold for much less than they would otherwise have done.

4th. Because the sheriff sold the premises for more than was due and unpaid upon said *fi. fa.*, the whole amount of which, including debt, damages, interest, and cost, was \$5 42, less than the amount for which it sold, as appears by the sheriff's return.

5th. Because the description of the premises, as contained in the advertisement and deed, is vague, uncertain and void.

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6th. Because the sheriff, in the advertisement and deed, falsely described the premises as the same acquired by said Clamorgan of Gabriel Dodier, by deed dated 4th November, 1793, whereas in fact no such deed ever existed.

7th. Because the sheriff, in his advertisement, falsely described the premises as bounded east by a fence, &c., west by the king's domain or vacant land, and south by the road to St. Charles, whereas no such fence did then exist, nor had existed for many years, and it was not bounded west by the king's domain, nor south by the road to St. Charles; that said description was throughout false, vague, and uncertain, as was well known, as well to the sheriff, as to O'Fallon and Lindell.

8th. Because between the land of Tayon, on the north, and the St. Charles road, on the south, there was in fact embraced two arpens by forty, whereas the sheriff in his advertisement and deed professed to sell only one by forty, leaving it entirely uncertain which of the two he intended to sell.

9th. Because the said sale was collusive, fraudulent and void.

The first and last reasons were subsequently withdrawn by the plaintiffs.

Notice of the motion was duly served upon O'Fallon and Lindell, the purchasers; but on no other persons. The motion was supported by the affidavits of Louis Clamorgan and Charles Collins, filed concurrently with the motion. The affidavits state in substance, that Jacques Clamorgan died in 1814, having made and published his last will and testament, by which he divided his estate into five parcels or shares, one of which he devised to his son St. Eutrope, one to his son Cyprian Martial, one to his daughter Apauline, and two to his son Maximin; that at the time of his death he was the owner, in fee simple of a certain tract of land in St. Louis county, containing one arpen in front by forty arpens in depth, the same which formerly belonged to Gabriel Dodier, by whom it was conveyed to a mulattress, named Esther, by deed dated 4th Nov., 1793, and by said Esther conveyed to said Clamorgan, by deed dated 2d Sept., 1794, and afterwards in 1811, confirmed to Clamorgan by the board of commissioners, and ratified by a subsequent act of congress; that at the time of his death Clamorgan left only the four children above named; that St. Eutrope was born on or about 27th November, 1799; Apauline about the month of April, 1803; Cyprian Martial in the same year, and Maximin in 1807; that St. Eutrope died intestate and without issue in 1825; that Maximin died intestate, without issue, and unmarried, about 7th June, 1825; that Cyprian Martial died 29th February, 1827, having made and published his last will and testament, by which he



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devised to his sister Apauline, and her three children, Louis, Henry, and Louisa, and to the survivor of them all, his estate, except a few specific legacies to other persons; that Apauline died about 1st May, 1830, leaving four infant children, Louis, Henry, Louisa, and Cyprian; that Louis was born 31st July, 1820; Henry, 21st July, 1822; Louisa at some period between 1823 and 1830; and Cyprian born a few weeks prior to the death of his mother; that Louisa died 18th August, 1834, unmarried, intestate, and without issue; that the said Apauline about 11th April, 1830, a few weeks before her death, and before the birth of Cyprian, made and published her last will and testament, by which after a few specific legacies of small amount, she devised to her two children, Louis and Louisa, and to any other children thereafter to be born to her, and to the survivor of them, all her estate; that these several wills have all been duly proven and admitted to record, copies of which are exhibited with the affidavits; the affidavits then recite the facts embodied in the motion in reference to the sale to O'Fallon and Lindell; it was admitted on the trial of the motion that a portion of the tract sold to O'Fallon and Lindell, has since been sold and conveyed by them in several parcels to various individuals, who are now in possession, claiming title under the sheriff's deed; but that a valuable portion of the tract yet remains in possession of Lindell by virtue of his purchase at the sheriff's sale; also that no other persons than O'Fallon and Lindell were notified of this motion. Upon this admission of facts, on the calling of the motion for trial, the plaintiffs in the motion offered to prove all the facts stated in the motion and affidavits; but the defendants O'Fallon and Lindell moved the Court to dismiss the motion on the face of it, and on the facts admitted, on the ground that the parties interested had not been notified, and that if all the facts stated in the motion and affidavit were true, the motion was not maintainable; the Court thereupon dismissed the motion, and the plaintiffs in motion have brought the case to this Court by appeal, and assign for error, the action of the Court in dismissing the motion.

The only point decided by the Circuit Court in this case, was that all the parties interested had not been notified of the motion, and therefore it was not maintainable—and the propriety of this opinion is the only question for our determination.

The argument from which the plaintiffs draw their right to dispense with a notice to the present claimants of the property, is chiefly the argument *ab inconvenienti*. This is a very good argument where a question may be decided either way, without interfering with any settled principle of law or equity. And if the proposition assumed in the argument, that

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the rights of the purchasers of this property from O'Fallon and Lindell, would not be affected by the judgment on this motion, be a true one, it would certainly be a matter of no importance to them that they should have an opportunity to be heard. But can this assumption be correct? This is an application to set aside a sale made by the sheriff, at which O'Fallon and Lindell became the purchasers. If the sale be set aside and declared void, what becomes of the title to those who have purchased from O'Fallon and Lindell? If the title of O'Fallon and Lindell be destroyed, of what value will be the title of those who hold under and derive all their right from O'Fallon and Lindell? Will not the purchasers be considered as privy to this judgment, and would it not be as legitimate evidence against them as it would be against O'Fallon and Lindell? If the judgment will not affect the present holders of the lots, it would affect nobody, and for this reason alone, the Circuit Court should decline to pass upon the motion. A Court is not bound to decide moot points of law, or to proceed with any case, until the proper parties are before it, whose interests its judgments are designed to affect.

Judge Scott concurring, the judgment is affirmed.

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 ST. LOUIS COUNTY COURT vs. JOHN SPARKS.
 

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1. A mandamus in the alternative, against a Court, may be served on the officers composing the Court in vacation, by delivering a copy of the original process. It may be addressed to the Court, or to the individuals composing it. But where the proceeding against a Court is for disobedience, the judges are to be proceeded against individually.
2. A mandamus may be issued to restore a person to an office to which he is entitled. But it cannot be issued where the office is already filled by a person holding by a color of right. In such a case a *quo warranto* is the proper remedy.
3. The appointment of a person to an office, who has not the necessary qualifications, is not void. He is *de facto* an officer, and his acts, until his removal, are valid.
4. A statute specifying the time within which a public officer must perform an official act regarding the rights or duties of another, is directory merely; unless the nature of the act, or the words of the statute shew that it was intended to be limitation of power.
5. The Circuit Courts have power by mandamus to control the actions of inferior tribunals.

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### APPEAL from St. Louis Circuit Court.

GAMBLE & BATES *for Appellant.*

#### POINTS AND AUTHORITIES.

1. The Circuit Court had no authority or jurisdiction in the case, to issue a mandamus. See State Constitution, Art. 5, §3—4 Bac. Ab. Tit. Mandamus, p. 496—and pp. 514—15—16.

In England, the mandamus is a high prerogative writ, pertaining to the King's Bench. In Missouri, the Constitution gives it, in terms, to the Supreme Court; and neither the Constitution nor any statute gives it to the Circuit Court. And so the Circuit Court cannot exercise it in any instance, unless in support of its own granted power, to supervise inferior judicial tribunals.

The County Court of St. Louis, in appointing a collector, are no more acting *judicially*, than the people are in appointing an assessor. The power to appoint a collector is not enumerated among its granted judicial powers. R. C. 1835, p. 156.

2. There was no case presented to the Circuit Court in which a mandamus could legally issue. Under this head we present these points:—

1st. The office of collector was filled, and therefore it was not a case for mandamus, to restore the former collector. 3 John. Ca. 79.—Angell & Ameson Cor. 565, 2 T. R. 260. (old edition.)

2nd. The Relator was not by law entitled to hold the office, for many reasons apparent on the record, but especially, because it was the express duty of the Court or Clerk to make an appointment, and because he had never been legally collector. 7 Eng. Com. L. R. 245—6 Mass. R., 462.

3. There was no service of the alternative mandamus which would authorize the order for a peremptory writ of mandamus. 4 Bac. Abr. 496—514—515—516, and the act of Assembly. Dec'r 22nd, 1836, p. 72.

#### LESLIE *for the Appellees.*

By the law of the State passed 12th December, 1836, page 130, the County Court for St. Louis County, are empowered to appoint a respectable householder "Collector of the Revenue," which appointment must be made at the first term of the year. As no power is given the County Court to appoint a Collector, to be exercised at any other term, or to be exercised upon any person not having the statutory qualifications; a failure in either of these particulars leaves the incumbent in office, until superseded by the action of another appointing power mentioned in the statute; and any removal of such incumbent, except by a strictly legal appointment of a successor, is illegal and void. This statute is to be construed strictly, and no power given to the County Court by construction, and it will be seen that no construction is necessary for all contingencies are fully provided for.

The case before the Court shows that Wise had not the legal qualifications, and consequently, the incumbent was not superseded. As well might the County Court appoint an infant, a non resident, a negro, or a person outlawed or *non compos*, and then say the office was filled, as to disregard the qualifications of householder, made indispensable by the very terms of the law.

The second appointment abrogates the first, and leaves this case in contemplation of law, as if the County Court of any other County of the State, not having the power of appointment, should turn out of office the person elected by the people.

If Sparks was entitled to the office, and was turned out of it, mandamus will lay to restore

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him, for there is no other specific remedy. 3 T. R. 646.—6 East. 356—2nd T. R. 259—3 Burr, 145.9—4 T. R. 369—10 Wend. 393—Minot's Digest, 466, and cases there cited. As to the propriety of the remedy, see also Bacon Abr. 4 vol., p. 500—1—2, letter C. 5 East. 14—15.

The return was rightly decided to be insufficient, because it stated conclusions of law instead of facts; and because it was in no manner responsive to the writ. S. N. P. 7—5 T. R. 66.

*SCOTT, J., delivered the opinion of the Court.*

The act of December 12, 1836, made it the duty of the County Court for the County of St. Louis, at the first term which should be holden in said County, in each year, to appoint a Collector of the Revenue for the said County, who should be a respectable householder in said County, and reside within the same, and should hold his office for one year, and until his successor was appointed. The second section of the act provided that if the Court at that term failed to make the appointment, then the Clerk of the County Court should make the same.

Under this act, John Sparks was appointed Collector of the said County, on the 13th March, 1843, and until his successor was appointed. Sparks qualified and entered upon the duties of his office. In March, 1844, the Court appointed Henry J. Wise the Collector for that year. It is alleged that Wise, at the time of his appointment, was not a householder. Wise entered upon the duties of his office; blank licenses were delivered to him, and Sparks was directed to make a settlement with the County Court, and to deliver possession of the office in which he transacted the business of the office, to Wise. Sparks failing to do this, he was forcibly ejected by the Marshal of the Court, under orders from the County Court. On this state of facts, Sparks applied to the Circuit Court of St. Louis County for a mandamus, compelling the County Court to restore him to the office of Collector.

On this petition the Court made a rule on the County Court of St. Louis, commanding it to restore Sparks to his office, or to show cause to the contrary.

In answer to the foregoing rule, the County Court states, that although Sparks was appointed Collector for the year 1843, yet he failed to give bond within the time prescribed by law. That Henry J. Wise was appointed Collector for the year 1844, who qualified and entered upon the duties of his office. That doubts having arisen whether Wise at the time of his appointment, possessed the qualifications required by law, the Court in April re-appointed him, all doubts relative to his qualifications for the office having been removed, and he again qualified.

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There was a demurrer to the answer, which was sustained by the Court, and thereupon a mandamus in the alternative was awarded to the County Court requiring it to restore Sparks, or show cause to the contrary.

This writ was directed to the members composing the County Court, individually styling them the Justices of the County Court, and was severally served on the Justices in vacation.

On the return of this writ, the Justices severally appeared, and moved to quash it, for the reasons that the said supposed writ was no writ, it containing no statement of any grievance. That it was improperly directed, being directed to the Justices of the County Court jointly and severally, whereas it should have been directed to the Court. That it was served by delivering a copy, whereas it should have been served by delivering the original. Upon this, a motion was made for a peremptory mandamus, which was awarded, and thereupon an appeal was severally taken to this Court by the Justices of the County Court.

As to the point made relative to the service of the conditional mandamus, it may be remarked, that a mandamus in the alternative may be served on the officers composing the Court in vacation, and that a delivery of a copy of the process showing the original, is a sufficient service. *The People vs. The Judges of Westchester*, 4 Cow. 403. 7 Wen. 474. 1 J. R. 61. It seems it may be addressed to the Court or to the individuals composing it. 16 J. R. 61. When, however, proceedings commence against a Court for disobedience, then the Judges composing it are to be proceeded against personally. In saying that the Judges composing a Court may be served in vacation, we do not mean to be understood that any judicial act could be done by them during that time.

It has been long held that a mandamus may be issued to restore a person to an office to which he is entitled. 4 Bacon, 500. But we are not prepared to say, that this was a proper case for the interference of the Circuit Court by mandamus. Various considerations incline us to this opinion. The office was already filled by one who was *de facto* an officer, at least; and it appears to be law that when an office is already filled by a person who is in by color of right, a mandamus is never issued to admit another person, the proper remedy being an information in the nature of a *quo warranto*. *The People vs. The Corporation of New York*, 3 J. Ca. 79. *Angel & Ames on Corporations*, 565. *The King vs. Mayor of Colchester*, 2 Durn. & East. It would not be just that Wise's right to the office should be determined on a proceeding to which



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he was no party. He was the proper person to vindicate his own rights, and a *quo warranto* was the proper mode under the circumstances to try the validity of his appointment. If the relator, Sparks, was entitled to the office in preference to Wise, yet as the Court was bound to make an appointment, and might have appointed him, or not, as they thought best, why should this Court do the nugatory act of restoring him, when the very next moment he may lawfully be superseded? When the appointing power has made an appointment, and a person is appointed who has not the qualifications required by law, the appointment is not therefore void. The person appointed is *de facto* an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the Governor to the Constable. Suppose a Sheriff in a County where there is much litigation, should act as such until near the expiration of his office, when he should be found disqualified and removed, what a scene of anarchy and confusion would be exhibited to the view of the community, if his acts should be held to be void? Even if Wise was disqualified, his appointment was not a nullity. A statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the requisite qualifications, his appointment is not therefore void, unless it is so expressly enacted.

Was Sparks entitled to the office? It is contended for him, that the County Court having failed to make a valid appointment during the term of the Court at which by law it was required to be done, the power of appointment devolved on the Clerk, and the Court could not make it. It is evident from the terms of the law, that an appointment by the Court was preferred to one by the Clerk, as the duty of appointing was only imposed on the Clerk in the event of a failure by the Court to make it. The Collector of St. Louis receives a large sum of money, and the law was anxious that his securities should be approved once, at least, in every year. It is a rule of construction, that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer. *The People vs. Allen*, 6 Wen. *Jackson vs. Hooker*, 5 Cow. 269, 2 Mass. 230. There was nothing in the nature of the power of appointment showing that it might not be as effectually

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exercised after the first term of the Court as before. There is no prohibition that it shall not be exercised afterwards. It would be strange if a statute specifying an early day at which an act must be done with a view to its speedy execution, should be construed that the act could not be done at all after the day, when the necessity for its performance is as great, if not greater afterwards than before. If the Court had failed to make the appointment in the term time, the Clerk could have made it; but clearly when the Court convened again the power of appointment in the Clerk was suspended. *Cui bono* restore Sparks to an office, in which he might have been immediately replaced by another according to law? The tenure of his office was limited to a year, and until a successor was appointed. When that appointment was made he had no more right to the office than any other individual in the community. *The King vs. Griffiths*, 7 Com. Law Rep., 246.

A question was raised by the appellant respecting the power of a Circuit Court to award a mandamus against a County Court unless in cases in which such a power is auxiliary to its own granted power to superintend inferior tribunals. That the Constitution of the State having conferred on the Supreme Court the power to issue writs of mandamus, and no statute conferring expressly such a power on the Circuit Courts, it cannot be exercised by them. It is true that this Court can issue a writ of mandamus. It is one of the few instances in which it can exercise original jurisdiction. But there is nothing in the Constitution from which it can be inferred that this power is exclusive. The oft recurring necessity for the exercise of this power, would render such a construction extremely inconvenient. To the necessity for such a writ to tribunals only inferior to the Supreme Court, we must attribute the delegation of such a power. No statute has yet attempted to designate the cases in which the writ shall go from this Court, nor shall we now attempt it. The first statute on the subject of these writs was enacted at the revision of 1825. That statute, although it does not in express terms authorize the Circuit Courts to award them, yet surely must have intended it, as its words are, "whenever any writ of mandamus shall issue out of *any Court of this State*," &c.; now if it had been the intention of the General Assembly that this power should be exercised exclusively by the Supreme Court, it would not have employed this phraseology. The statute, with the exception of a short period, has remained in force unaltered up to this time, and the construction put upon it, and acquiesced in, has been that the Circuit Courts may issue writs of mandamus. *Boone County vs. Todd*, 3 Mo. Rep. 103. St.

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Louis County Court vs. Ruland, 5 Mo. Rep. 270. The law establishing Courts having in pursuance of the Constitution, conferred on the Circuit Courts a superintending control over the County Courts, and as there may be many instances in which such tribunals may require such control otherwise than can be afforded according to the usages and principles of law by appeal, or writ of error, we must contend that this power must have been designed by the Constitution to have been entrusted to the Circuit Court, in order to a complete exercise of that control over them with which they have been invested. Such a construction reconciles all parts of the Constitution, and affords suitable instances for the exercise of the powers with which each has been clothed.

Judge NAPTON concurring, the judgment will be reversed.

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BANK OF THE STATE OF MISSOURI vs. MERCHANTS' BANK OF BALTIMORE.

1. When objections to the reading of depositions are made in the inferior Court, but the grounds of objection not specified, the objections will not be looked into in the Supreme Court.
2. A violation of its charter by a bank, cannot be taken advantage of collaterally, or incidentally, but must be brought up on a proceeding instituted for that purpose against the corporation.
3. A contract between the bank of Missouri and the Merchants' bank of Baltimore, to collect the debts of the latter in depreciated bank paper, even if admitted to be illegal and in violation of the charter of the former, will not render her liable to pay in specie the amount collected under such contract.

APPEAL from St. Louis Court of Common Pleas.

*POLK for Appellant.*

To reverse the judgment of the St. Louis Court of Common Pleas, the plaintiff in error relies on the following points:

1. That the depositions of Danl. Sprigg, Thos. D. Johnston, and John B. Morris, offered in evidence by the defendant in error, ought to have been excluded by the Court of Common Pleas on the motion of plaintiff in error to that effect.

The record shows no notice of the taking—no commission—no authentication—and none of the exigencies in which alone, by our statute, the deposition of a witness may be read in evidence. See Code of 1835, p. 221, §2, 3, 4, 5, 6, 15, 16, and 19.

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2. That the copy of the charter of the Merchants' bank of Baltimore, and of the act of the legislature of Maryland in regard to damages on protested bills of exchange, ought also to have been excluded from the jury, because not authenticated according to law. Code of 1835, p. 250, §283; 1 Story's Laws 93, and 2 do. 947.

3. The Court of Common Pleas improperly excluded certain portions of the testimony of the witness Shurlds, which portions are *underscored* in the bill of exceptions, and thus designated.

4. The Court below erred in excluding from the jury the circular letters offered in evidence by the defendant, especially the first one of those letters. It bore date long before the date of the draft given in evidence by the plaintiff. It was written by defendant's authorized and acting cashier, to the authorized and acting cashier of the plaintiff. It related to and fixed the terms of the very dealing out of which this suit originated. It stated the terms upon which defendant would collect for plaintiff, and was meant to condition and limit the dealings and liabilities of the parties. It was relevant and pertinent, and no objection was or could be made for any informality or technicality.

If incompetent, therefore, it must have been so only because it contained the terms of a contract which the defendant had no right, by the laws of the land, to make. But I deny, for the reasons already stated on the 3d point, and for those which will hereafter be stated on the 5th point, that the laws of the land prohibited the contract whose terms are set forth in that letter.

5. I maintain that the Court below erred in the instructions it gave to the jury, and that its judgment ought to be reversed for that reason. Session acts of 1837, p. 17, and following sections 18, 19, 26 and 35; 3 Wend. 94; 12 John. R. 231; 7 Cranch 306. It held substantially, that the defendant's charter prohibited her from dealing in depreciated funds; that the course of dealing given in evidence was violative of her charter, and that, consequently, she became responsible in specie for the whole amount of currency she had collected for plaintiff, and was not authorized to tender in payment of checks drawn on her for the amount of such collections, the same kind of currency or funds she had received in making such collections, although said funds were received by virtue of an express understanding to that effect between the parties.

6. The Court of Common Pleas erred in refusing to give the instructions prayed by defendant's counsel, excepting the 2d, which submits to the determination of the jury a question, which is at least, in part, if not entirely, a question of law. Code of 1835, p. 98, §8, title Bills of Exchange; *Riggs vs. the city of St. Louis*, 7 Mo. R. 438.

7. The Court below ought to have set aside the verdict and granted the defendant a new trial. Not only because of the errors of law already enumerated, but because the jury found against the evidence.

### SPALDING & TIFFANY *for the Appellee.*

#### POINTS AND AUTHORITIES.

1. The objections to the reading of depositions of plaintiff were properly overruled. 3 Howard's Rep., (United States,) *Camden vs. Doremus, Suydams & Nixon*; 8 Mo. Rep. 128, *Fields vs. Hunter*.

2. The objection to the reading of the act of Assembly of Maryland, certified from the office of the Court of appeals, was properly overruled, as being too general, and as having no foundation even if sufficiently specified.

3. The Court below did not err in excluding the three circulars of the bank of the State of Missouri.

4. The instruction given below for plaintiff was right, there having been no special agreement shown as to the kind of funds in which the collection was to be made; and public policy not permitting the bank to give such notice of collecting in depreciated paper, and then discharging itself from liability for specie or its equivalent; and there being no proof whatever that tender was made

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in the funds actually received on the claims sent by the plaintiff, but may have been made in paper much more depreciated than that received on said claims. 11 Wheat. 258; Chitty on Contracts, as to consideration against public policy, or illegal or immoral, page 657; 3 Dessans 132; 11 John. 23; 16 Serg. & Rawle 147. Although Courts will not aid parties to recover on transactions arising from illegal agreements, yet where illegal transactions have taken place, an agent who has received money on the part of his principal, will not be permitted to shelter himself from payment of it to his principal on ground of illegality of consideration of original transaction. Rev. Code of 1835, p. 95; Acts of 1836-7, p. 24, and Acts of 1842-3, p. 20.

5. No exception was taken to the exclusion of certain oral testimony.

6. The 1st, 2d, and 5th instructions of defendant raised the same questions as the plaintiff's instructions. The 3d instruction of defendant is of no applicability to the case. The 4th is wrong as nobody contends that the recovery is by the laws of Maryland. The 6th instruction about John Smith has nothing to do with the case.

NAPTON, J., *delivered the opinion of the Court.*

The Merchants' bank of Baltimore brought an action of assumpsit in the Circuit Court of St. Louis, against the bank of the State of Missouri. The special counts of the declaration averred, in substance, that on the 6th of July, 1839, the bank of Missouri was indebted to the bank of Baltimore in the sum of \$20,000, for so much money theretofore collected, and being so indebted, on said 6th day of July promised said Merchants' bank to pay her drafts or checks not exceeding such indebtedness; and that on said day and year the said Merchants' bank of Baltimore drew a draft on said bank of Missouri, at St. Louis, for \$14,580, in favor of one Charles Goodwin, to whom the same was delivered; which said draft, on the 19th July, 1839, was presented for payment at the banking house of defendant and protested for non-payment; that by means thereof the said Merchants' bank became liable to pay, to the holder of the draft, said sum of \$14,580 00, together with cost of protest, interest and damages, according to the laws of the State of Maryland; and that by these laws the holder of the draft was entitled to recover of the Merchants' bank damages on the draft at the rate of eight per cent. upon the principal sum thereof; that on the 3d of August, 1839, the Merchants' bank paid to the holder of the draft \$15,735 10, being the amount of principal and damages thereon, interest, &c., of all of which the bank of Missouri had notice, by means of which, &c. &c.

The pleas were non-assumpsit, set off, and payment. The case was transferred to the Court of Common Pleas, where it was tried, and the plaintiff had a verdict for \$1,604 76, and judgment accordingly. Motions in arrest of judgment, and for a new trial, were made, but overruled.



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It appeared in evidence on the trial that the Merchants' bank had drawn a check upon the bank of Missouri, on the 6th July, 1839, for \$14,580, in favor of Chas. Goodwin, which was presented for payment on the 19th July, and protested for non-payment. It appeared also that the Merchants' bank subsequently paid the amount, with interest, costs of protest, &c. It appeared also, that the bank of Missouri offered to pay the check in depreciated bank paper, but that payment was demanded in specie; and further, that the check was subsequently paid in *currency*, so that the matter in dispute in this case was merely the difference between the face of the check and the actual specie value of the currency paid out, which was alledged and proved to be about ten per cent. below par, and the damages, &c.

The bill of exceptions states that objections were made to the introduction of several depositions, read on behalf of plaintiff, but that these objections were overruled, and the defendant excepted.

It was proved by some of the depositions, to which exceptions of this character were taken, that there was in Baltimore, in July, 1838, a convention of delegates from certain banks, by which the 13th day of August, 1838, was fixed upon as the time for resuming specie payments. This convention was attended by John Smith, the then President of the bank of Missouri.

Copies of the charter of the Merchants' bank, and of the act of the legislature of Maryland, fixing the damages recoverable on protested bills of exchange, were also given in evidence by the plaintiff. The authentication of these acts was objected to. The copy is certified by the clerk of the Court of Appeals for the western shore of Maryland, to be a true one, and to be extracted from "*Liber, &c.*," being one of the law records of the State of Maryland, belonging to the office of the Court of Appeals for the western shore of said State. To this certificate is affixed the seal of the Court. The chief judge of the Court of Appeals certifies that the foregoing attestation is in due form and by the proper officer. Then follows the certificate of the governor, certifying to the character of the chief judge, under the great seal.

The cashier of defendant testified that the bank of Missouri, when this check was presented for payment, dealt in currency, that is, notes of Indiana, Illinois, and Kentucky banks; that the checks of the Merchants' bank, upon the defendant, had been heretofore paid in that way; that the understanding was that the defendant should collect the demands or claims sent for collection by plaintiff, in currency; and that plaintiff was to receive the same kind of funds that might be taken by the defendant,

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in payment of the plaintiff's claims. This testimony, tending to show an agreement between plaintiff and defendant as to the kind of funds which the defendant was to receive on the plaintiff's claims, was excluded by the Court. This witness also stated, that the first suspension of specie payments took place in May, 1837, and the first resumption was on 13th August, 1838; that the second suspension was in October, 1839, and the second resumption in 1840.

The defendant offered in evidence three letters, which it was admitted had been written by defendant's cashier, and sent to plaintiff. These letters were excluded by the Court. The first bears date May 30, 1837; the second, Oct. 25, 1839; and the third, March 13, 1841. They are all couched in the same language, being to the following effect:—

BANK OF THE STATE OF MISSOURI, }  
St. Louis, May 30th, 1837. }

*D. Sprigg, Esq., Cashier Merchants' bank of Baltimore:*

*Sir.*—This bank will receive in payment of debts, notes of those banks of the eastern cities that are considered of good standing, and notes of the Pittsburg, Wheeling, Cincinnati, Louisville, and New Orleans banks, and of the State banks of Illinois and Indiana.

Collections will, therefore, only be made for those banks or individuals whose checks or drafts may be paid with any or all the notes thus received in payment; or with the drafts or checks of this bank, on such points as it may be convenient to draw, at such rates of exchange as may be considered proper. Subject, however, to such changes as may, from time to time, be deemed expedient. We will charge you one-half per cent. within, and one per cent. without the State of Missouri, for collection. Should you think proper to entrust your collections to this bank, under the suggestions above, they will be cheerfully attended to.

Very respectfully, yours,

H. SHURLDS, Cashier.

The Court instructed the jury as follows: "If the jury believe from the evidence that the defendant was indebted to the plaintiff on the 19th July, 1839; that a draft for the amount of that indebtedness drawn by a duly authorized officer of the plaintiff, was presented on that day for payment by the proper holder thereof; that payment was then and there refused by the defendant unless the holder would receive funds not equivalent to specie; that said draft was therefore protested and plaintiff duly notified thereof; that by reason of such notice and protest, and by force of the laws of Maryland, in which State said Merchants' bank is situated, said plaintiff became bound to pay, and did pay the holder of said draft certain damages, costs and interest, upon said draft, the jury

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will find for the plaintiff the amount of such payment with interest from the date thereof."

In explanation of the foregoing instruction, the Court stated "that the bank of the State of Missouri had no power under its charter to deal in depreciated funds, and that the Court hold, that the course of dealing which had been given in evidence, as a defence to this action, was a violation of that charter."

The first question presented by the record, is the objection growing out of the refusal of the Court to exclude certain depositions to which objections were made at the trial. The objections taken here to these depositions are not based upon any incompetency or irrelevancy of the testimony contained in them, but solely relate to the form of their authentication, and the absence of all proof that either of the exigencies have occurred which by our statute alone authorizes their admission. It might be made a question, whether this Court would consent to reverse a judgment upon this ground, unless it was shewn affirmatively, by the plaintiff in error, that no rule of Court existed requiring objections of this character to be made previous to the trial. But it is sufficient to say, that no specific objections were made to the depositions, and it is impossible for this Court, from the record, to conjecture that the objections now taken are the same which were presented to the Court which tried the case. It is in conformity to the previous practice of this Court not to look into such objections. *Dickey and others vs. Malechi*, 6 Mo. R. 186; *Frost vs. Pryor*, 7 Mo. R. 316; *Field vs. Hunter*, 8 Mo. R. 131; 19 Wend. 550; *Camden vs. Doremus, Suydan & Nixon*, 3 Howard R.

The objection to the manner in which the statutes of Maryland were authenticated, was a specific one, and it has therefore been examined. It is quite apparent that these statutes have not been authenticated in any of the modes pointed out by the act of congress of May 26th, 1790. The act of congress provides that the laws of the several States shall be authenticated by having the seal of their respective States affixed thereto. Under this statute it has been held that the attestation of a public officer is not necessary to authenticate a copy of an act of the legislature, but the seal of the State affixed, by an officer having the custody thereof, to a copy of the law, will be conclusive evidence of the existence of such law, and no other proof is necessary, and in the absence of all proof to the contrary, it will be presumed that the seal was annexed by an officer having competent authority to do the act. *U. States vs. Amedy*, 11 Whea. R. 392. In the present case, the great seal of Maryland is not affixed to the law, but to a certificate of the governor that James

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Buchanan is the chief judge of the Court of Appeals of that State. There is no room for presuming that the great seal was designed to authenticate the law, for any such presumption is repelled by the certificate.

Nor is this law authenticated according to the mode provided by the act of congress for authenticating records and office books, kept in a public office, not appertaining to a Court. The certificate of the presiding judge in such case is required to be authenticated by the certificate of the clerk; here it is authenticated by the certificate of the governor.

It is argued, however, that this authentication is good at the common law. In relation to that, the rule is, that the best testimony, which the nature of the thing admits of, shall be required, and therefore the sanction of an oath is necessary, unless the copy be verified by some such high authority that the law respects it not less than the oath of an individual. An authentication under the great seal of the State, affixed by the keeper thereof, would, we apprehend, be good at common law. These laws are not, however, as we have seen, authenticated in this mode, nor are they sworn copies; and the only other mode known to the common law would be an authentication by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. We are not prepared to say that these laws have not been so authenticated as to come within the requisitions of the common law. A difficulty, however, presents itself in regarding the authentication valid as a common law authentication, from the fact that the certificate is made by the clerk of a Court;—an officer who would not *prima facie* be thought likely to be the keeper of the statute rolls of a State. Is not this objection fully answered by the judge's certificate, who certifies to the character of the clerk, and that his attestation is in due form and by the proper officer? We incline to believe the attestation sufficient, but as the case will be remanded upon other grounds, the question is not likely to become important in this case; the statutes of Maryland may be authenticated, at the next trial, in the simple and easy mode pointed out by the act of congress.

The main question in the case grows out of the opinions expressed by the judge who presided at the trial, that the bank of Missouri had no power under its charter to deal in depreciated paper, and therefore that the course of dealing between the plaintiff and defendant was a violation of that charter. This opinion seems to have occasioned the exclusion of Shurlds' testimony and the circular letters, the tendency or object of which was to establish a contract or understanding between the parties

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which the Court, it is presumed, considered an illegal one. No other ground has been suggested upon which the exclusion of the circular letters could be placed, except that their purpose was to show an illegal contract—a contract either against public policy or violatory of the bank charter of the defendant.

We do not propose to examine the question which has been made upon the construction of the charter of the bank of Missouri. That question may become an important one, should a case arise in which its decision would be proper. Whether the bank of Missouri has violated its charter in making a contract with the Merchants' bank of Baltimore, to collect the debts of the latter in depreciated paper, is not a question which can arise in the present suit. A violation of the charter of the bank cannot be taken advantage of collaterally or incidentally, but must be brought up and enforced by a direct proceeding instituted for that purpose against the corporation. 2 Kent Com. 261; Angel & Ames on Cor. 664. It is true, that the Court would not imply a contract which would be in violation of the charter of the bank, where no express contract was proved; but the object of the testimony of Shurlds, and the introduction of the circular letters, was to show an express understanding between plaintiff and defendant. And so the Court of Common Pleas seems to have understood the character and scope of the testimony; for the instruction of the Court was, "that the course of dealing, which had been given in evidence as a defence, was a violation of the charter of the bank of Missouri." Whether this understanding or agreement was satisfactorily shown, or can be hereafter satisfactorily shown, is another question, and a question not to be determined by this Court. If the contract or course of dealing which the testimony in the case conduced to show, was violatory of the charter, will that fact convert the paper money which was collected by the defendant for the use, and at the special instance of the plaintiff, into specie? Will the Court make a new contract for the parties, because the one they have made for themselves is not a legal one? Shall we not rather apply the maxim *ex turpi contractu non oritur actio*? If the contract of the bank of Missouri with the bank of Maryland, to collect the dues of the latter in suspended bank paper, made through the agency of the officers, was not a contract warranted or authorized by the charter of the former bank, it was not a binding contract on the bank of Missouri. But surely this does not make her responsible for the amount collected by her, under such an arrangement, in specie. Upon what principle is such a responsibility based, or from what source is it drawn? It is not because such was the agreement and understanding of the par-



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ties, for the hypothesis is, that the agreement and understanding was that the notes of suspended banks might be collected, and that payments were to be made only in such notes. It cannot be that the law will imply such a contract, when an express contract of a different character is proved; that the contract is to be regarded as a legal one, so far as it is a contract to collect the debts of the plaintiff, but so far as it is a contract to pay over to the plaintiff the same species of money received by defendant in payment of these debts, it is to be considered illegal, and a legal contract substituted in its place. Such a construction, it strikes us, would be exceedingly inequitable, to say the least of it. It would be a partial rescission of an agreement, and a substitution of a new agreement in lieu of so much of the old one as is thought to be illegal.

In regard to so much of the testimony as related to the bank convention in Philadelphia, and its proceedings, in which the president of the bank of Missouri participated, we are unable to see that it had any bearing upon the case.

Judge SCOTT concurring, the judgment of the Court of Common Pleas is reversed, and the cause remanded.

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HENRY CHOUTEAU ET. AL. VS. JAMES HEWITT, ET. AL.

1. The statute authorizing amendments to pleadings, &c., does not admit new plaintiffs to be introduced.
2. One of several partners in a chattel may sue and recover for damages to the same, unless defeated by a plea in abatement.

APPEAL from St. Louis Circuit Court.

SPALDING for Appellants.

POINTS AND AUTHORITIES.

1. The Court erred in permitting the plaintiffs below to amend the declaration by the alteration of the names of some of the plaintiffs, and by the insertion of others; and especially at so late a period as after it had been called for trial. As the suit was originally brought, there were 27 plaintiffs named in the declaration and writ.

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As amended, the declaration contained *thirty-one* names of plaintiffs. 1 Rev. Code, page 467, §1, authorizes *amendment* of any process, pleading, or proceeding in any action; but does not authorize the changing the action; making new parties is a change of the action, not an *amendment* of any process, pleading or proceeding in it. 2 Tidd. 753—756—758. Graham's Prac. 521—530. 8 Cowen, 122.

2. It is not like amendments in cases of misnomer, for then the proper persons are parties, and remain parties after the amendment, the name only being changed; but here *four new plaintiffs* are added. 2 John. cases, 336. 1 Chitty, 75—76, as to consequences of not joining all the plaintiffs.

3. The Court below ought to have given the instructions asked for by the defendants below, which instructions were based upon variance in the proof from the declaration. The declaration alleged that *Joseph Anderson*, the defendant, was Master of the Little Red at the time of the accident. The proof was that John G. Anderson was then the Master, but he never was part owner.

4. The plaintiff's instruction is exceptionable. 5 Mo. Rep. 230.

5. The Court below should have set aside the verdict, and granted a new trial. Graham on New Trials, 483—4. 2 Wm. Black. Rep. 955. 5 Mo. Rep. 248, 323, as to filing reasons for new trial, and affidavits after the 4 days, as to cumulative evidence, and what it is. Graham's New Trials, 493. 6 Pick. 114, 417. 4 Wend. 579. Rule as to cumulative evidence relaxed in certain cases, 14 John. Rep. 186. 5 Cowen's Rep. 207. Graham's New Trials as to diligence, page 473 to 477, where the cases are distinguishable from this.

### GAMBLE & BATES, for Appellees.

#### POINTS AND AUTHORITIES.

1. The amendment of the declaration was rightly permitted. Revised Code, 467, Art. 6, §1, 2 and 3. In other Courts where the statutes are less comprehensive in the language allowing amendments, the decisions are liberal enough to authorize this amendment. 3 Metcalf, 273. Barker vs. Burgess, 3 Mass. 208. 2 Brock. C. C. R. 14. Again, this matter of amendment is purely discretionary, and not the subject for which writ of error lies. Again, no bill of exceptions lies to such decision. Revised Code, 464, §20, and 2 Tidd. p. 911.

2. The instructions asked by defendants were rightly refused. The difference between the name Anderson, called Master in the declaration, and the person proved to be Master, is no variance between the cause of action in the declaration and that in the evidence.

3. The new trial was properly refused. The first set of reasons assigned apply only to the same subject or point as was embraced in the instructions refused, except the reason that the verdict was against law and evidence. The additional reasons are upon the ground of newly discovered evidence; and the motion so far as it was founded upon those reasons and the affidavits accompanying, was properly overruled. 1st, Because the grounds of the motion apply only to one of the defendants, Chouteau, and the verdict as to the other defendants is not thereby impeached. A verdict is entire, and cannot be set aside in part, 2 Tidd's Practice, 941. 3 Salkeld, 262. Graham's Practice, 517. This is unlike the case of Brown vs. Burrus, 8 Mo. R. 26. 2nd, Because the depositions proving the fact of injury to have happened on the 15th of May, were on file in the cause years before the trial, and there was most gross negligence in preparing for his defence if he really had one. After such negligence the Court will not grant a new trial, 18 John. R. 489. 7 Mass. R. 207. 10 Wend. 292. 1 Cowen, 359. 8 John. R. 84. 15 John. R. 210. 2 Caine's R. 129. 3rd, Because the affidavits do not show with any precision that there was any material evidence newly discovered. It is but a case of old known facts forgotten—not testimony newly discovered.

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*Chouteau, et. al. vs. Hewitt, et. al.*

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SCOTT, J., *delivered the opinion of the Court.*

This was an action on the case for a *tort*, brought by the appellees, against the appellants, owners of the steamboat Little Red, to recover damages caused by the negligence of the officers of the steamboat, by which she struck against a flat-boat of the appellees, loaded with salt, and sunk her. The defendants pleaded not guilty. At the trial term, which was a considerable time after the commencement of the action, the plaintiffs applied for leave to amend their declaration on the affidavit of an agent who caused the suit to be brought, stating that he furnished to the attorney of the plaintiffs, the names of the part owners, composing the firm of Hewitt, Ruffner & Co., for the purpose of bringing this suit; that in so doing he omitted the names of four of the partners of said firm; that the partnership was formed on the principles of a joint stock company, each person being interested in proportion to the stock he held; and that sales of interests in the stock of said firm were made by those who were original partners or stockholders to other persons, with which sales the affiant was unacquainted; so that at the time of the accruing of the cause of action in this suit, the persons omitted had become interested as partners. The Court thereupon granted leave to amend the declaration by inserting the names of plaintiffs omitted, and by correcting a mistake in the name of one who was already named. To this an exception was taken.

On a trial a verdict was rendered for the plaintiffs for \$3465 68.

A motion for a new trial was made on the ground that Chouteau, one of the defendants, was mistaken in matters of fact, and thus prevented from making his defence. Affidavits in support of this motion were filed.

It was argued for the appellees that the allowance of the amendment can not be assigned for error, for the reason that a bill of exceptions can not be taken to such an act, it not occurring during *the progress of the trial*, the words of the act allowing bills of exceptions. It may be questioned whether a bill of exceptions is in all cases necessary to bring up a record in case of the allowance of amendments, 3 Mass. 208. Be that as it may, the statute relative to bills of exceptions has received a practical construction ever since its introduction into our code, from which it would be unsafe now to depart, and the overturning of which would deprive this Court of the power of reviewing many matters over which its jurisdiction has long extended. We are not prepared to say, that that construction is not warranted by the words of the act. Our

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statutes have made great innovations in the common law practice. Many matters may be brought before the Circuit Courts by motion, upon which there may be a final decision, upon which a writ of error will lie. These motions may be made before a jury is sworn in a cause, or before it is submitted to the Court, and even when there is regularly no action pending. How can the decisions in such cases be reviewed in this Court unless a bill of exceptions is allowed? By the common law a writ of error lies on all final judgments of Courts of record. Our statute has gone farther, and allowed them upon any final judgment or decision in any case. Many motions may be made, on the decision of which a writ of error will lie. Our books of reports from the oldest to the latest abound with cases in which bills of exceptions have been taken on other occasions than during the progress of a trial of the issues by the Court or jury.

On the propriety of the amendment itself this Court must say that it ought not to have been permitted. By the common law, independently of any statutory provision on the subject, amendments are in all cases in the discretion of the Court for the furtherance of justice. At common law, until a final judgment is entered, and the term past, amendments could be made, but after the term at which a judgment is entered, amendments can only be made by the statutes of *jeo fails*, 3 Black. 407. Graham's Practice, 524. When the amendment was made in this case, it was in such a state, that if the amendment was warranted at all, it was warranted by the common law, for our statute of amendments, so far as amendments are concerned, whilst the proceedings are *in fieri*, is merely declaratory of the common law. Now if by the common law amendments of the character made in this case were allowed, is it not obvious that much of the learning in the books on the subject of parties would have been useless, and instead of the labored essays on this branch of the law we meet with, the subject might have been disposed of in a much more summary way. The consequence of not joining a plaintiff as a party, is shown in all the elementary works on pleading; but we have not been enabled to find where it is said that the omission can be obviated by an amendment. If it were allowable, it would certainly have been somewhere suggested. There is nothing in the affidavit which was the foundation of the motion to amend, which might not be alleged by every one making such applications, and if it were allowed, rules sanctioned by the profession from time immemorial would be subverted. Mistakes in the names of parties have been amended; but to allow new plaintiffs or defendants to be inserted in a declaration

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by way of amendment, would be going a length wholly unprecedented. The fact that the plaintiffs in this case were a company consisting of many individuals, does not vary the principle. The names of all the individuals composing a firm or company not incorporated, must be set forth with certainty in the declaration.

Amendments in matters in which they are allowable, are so much in the discretion of the Circuit Courts, that this Court has of late manifested great reluctance to interfere with the action of these Courts on the subject. A liberal discretion should be exercised in the allowance of amendments in furtherance of justice. In matters wherein amendments are allowable, it would require a strong case to provoke the interference of this Court; but when Courts depart so far from principle as to permit amendments, in matters wherein amendments are not allowable, a concern for the preservation of rules which have always been deemed necessary to uphold the science of pleading which is so necessary to a correct administration of the law, must induce such action on the part of this Court as will preserve ancient and established principles.

This being an action *ex delicto*, and as the non joinder of the plaintiffs who were omitted could only be taken advantage of by plea in abatement, it being clear that one of several partners of a chattel may sue and recover, unless the action is defeated by plea in abatement, *Addison vs. Overend*, 6 Term 766—the judgment will be reversed, and the cause remanded, Judge *NAPTON* concurring.

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*SUSAN PRICE vs. JOHN THORNTON, ET AL.*

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1. The owners of a steamboat are liable to the owner of a slave carried off and lost by the carelessness of the Captain, in permitting said slave to ship upon his boat.
2. The act which makes penal the carrying slaves out of this State by the Captain of a boat, is to be construed strictly, and applies only to such as knowingly carry away a slave. For such an act, it being a high crime, the owners would not be liable.
3. The declarations of the Captain at the time of taking the slaves upon the boat, or during the voyage are admissible against the owners; but not declarations made subsequent thereto.

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## APPEAL from St. Louis Circuit Court.

*GANTT for the Appellant.*

The plaintiff in error contends, and submits to the Court here, that

1. The admissions of White, a part owner of the Leavenworth, were admissible in evidence against the other owners, as well as himself.

2. That the negligence and privity of White, agent of the owners of the Leavenworth, is the negligence and privity of the owners themselves. If he knew, or negligently permitted the slaves to be carried on the Leavenworth, the owners are liable, the boat being engaged in her regular voyage or trip.

3. That the owners of a steamboat are liable on general principles for the negligence of their agents, to any one who sustains damages thereby.

4. That neither our statute nor the general law requires that the owner of the boat should be privy to the fact that he is abducting, or furnishing means of absconding to, a slave, by means of his vessel, in order to make him liable to the owner of the slave.

5. That the Court improperly excluded the evidence tending to show that the Leavenworth necessarily went out of the State in coming from Glasgow to St. Louis.

*GEYER for the Appellees.*

The defendants in error claim the affirmance of the judgment of the Circuit Court on the following grounds:

1. The defendants as part owners of the Leavenworth are not answerable for the tortious acts of Capt. White, either as Master or part owner, to which they were not privy, and did not authorize, Abbot on Ship. 132. The responsibility of owners for the acts of the Master is not universal, but is confined to cases within the scope of his authority. Reynolds vs. Tappan, 15 Mass. 370. They are not liable for acts of piracy. Dios vs. Owners of Revenge, 3 Wash. Cir. C. Rep. 262.

2. The Circuit Court at St. Louis could not entertain the suit after a *nolle prosequi* has been entered against the only defendants within its jurisdiction. Rev. C. 1835, page 450, sections 4, 6.

3. The declarations of White after the slaves arrived at St. Louis are not competent evidence against the defendants.

*NAPTON, J., delivered the opinion of the Court.*

This was an action on the case, brought by the plaintiff in error, against the defendants, who were sued in connection with David Tatum and Samuel Lewis, as owners of the steamboat General Leavenworth. The declaration contained four counts, charging the defendants with having, through their agent and servant, the Master of the said boat, carelessly and negligently shipped on board of said boat two slaves belonging to the plaintiff, without the consent or knowledge of the plaintiff, whereby the said slaves were totally lost, &c. The defendants pleaded not guilty.

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The bill of exceptions taken at the trial shows that the plaintiff offered testimony conducing to establish the following facts:—Joseph White was the Captain, and part owner of the steamboat *Leavenworth*, and whilst said boat was lying at Glasgow, two slaves belonging to the plaintiff applied to him for passage on his boat to St. Louis, and produced some papers which the witness thought did not have any seal affixed thereto. Capt. White was heard to tell them that their passage to St. Louis would be four dollars a piece, if they wooded. Capt. White's attention was directed once or twice during the downward trip of the boat to the propriety of investigating more closely the character of the negroes; but nothing was done, and the negroes after their arrival at St. Louis, escaped in another boat bound for Cincinnati—and were never recovered.

The plaintiff offered to prove upon the trial, the declarations and admissions of Capt. White; but they were excluded.

The Court, at the instance of the defendants, instructed the jury that if they found from the evidence that the slaves in the declaration mentioned, were shipped on board the steamboat *Leavenworth*, without the knowledge or consent of the defendants, the plaintiff could not recover.

The defendants had a verdict and judgment. The case is brought here by writ of error.

The question presented by the record is, whether an action on the case can be maintained against the owners of a steamboat for the negligence of the Master, in permitting the plaintiff's slaves to take passage on the boat as freemen, or in allowing them to be shipped on the boat, without the consent of the owner of said slaves. That an action of trespass in such case would lie against the Captain, was decided by this Court, at the last term, in the case of *Eaton vs. Vaughn*.

The general principle of law is, that the Master is liable for the acts of his servant, when the servant is acting in execution of the authority given him. Where a servant loses sight of his Master's interest and business, and through mere malice of his own, commits a trespass or felony, the Master is not liable. But even when a trespass is committed by the servant, if done through negligence or inattention, and whilst in the attempted discharge of duty, the Master is liable, not for the trespass, but in an action on the case for the damages consequential on his employment of an unskillful servant. *McManus vs. Crickett*, 1 East. 108. It is upon this principle that actions have been brought and maintained against the proprietors of stage coaches, rail road cars, &c., for injuries resulting from the mismanagement of their officers and servants.

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Moreton vs. Hardem and others, 4 B. & C. 223. Johnson & Co. vs. Small, 5 Ben. Mon. 25. It is upon the same grounds that owners of ships have been held liable not only for the contracts but for the torts of the Master, when done within the scope of his employment. The responsibility cast upon the owners of ships for the acts of the Master, is based upon the soundest principles of public policy, arising not only from the fact that the Master is selected by the owners, and held forth to the public as a person worthy of trust and confidence, but growing out of the necessity of preventing opportunities for fraud and collusion, which would otherwise be afforded. Abbott on Shipping, p. 131. Hence all injuries by collision, arising from the want of skill and care of the Master, fall upon the owner. 4 Dall. R. 206. 1 Dall. R. 184. But the responsibility of the owner is not confined to cases of this character; for any other *torts* committed on the high seas, except where they are acts of piracy, the owners are personally liable. Mauro vs. Almeida, 10 Whea. R. 486. Mealary vs. Shattuck, 3 Cranch, 458. Murray vs. Charming Betsey, 2 Cranch, 483. The Apollon, 9 Whea. 362. In Talbot vs. The Commanders and Owners of Three Brigs, (2 Dall. 103,) the responsibility of the owners for the default of the Master for an illegal seizure on the high seas, was fully maintained; and it is said by Judge Story, in his notes to Abbott on Shipping, (p. 132,) that the right to institute proceedings in the admiralty by a suit *in personam* for *torts* on the high seas against the Master and owners, has been well established, and applies to cases of spoilation, illegal seizure, and personal damage. The case of the Amiable Nancy (3 Whea. 546,) is a striking illustration of the character of this responsibility, and the extent to which it has been carried. That was a suit against the owners of a privateer, for boarding a neutral schooner, and robbing and plundering the libellants who were on board the schooner of divers articles of wearing apparel and money, and robbing and plundering the schooner of her papers. The Court said:—"Upon the facts disclosed in evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country, and the duty of the Court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has



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from motives of policy devolved a responsibility for the conduct of the officers and crew employed by them, and yet from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in case of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it, in the slightest degree. Under such circumstances we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."

This case is only cited to illustrate the principle that where the Master of a ship is in the apparent discharge of his duties, the owners are liable for trespasses committed on the high seas, however outrageous they may be, if they fall short of piracy. It was the business of the privateer to capture vessels of the enemy, but not those belonging to neutral nations; and where through mistake or negligence the rights of neutrals have been invaded, the redress of the injured party is not confined to the Master and crew, who commit the illegal seizure, but the owners of the privateer are held responsible. It is equally well settled that they would not be responsible for acts of piracy committed by the officers and crew; for these acts cannot in any sense be deemed within the scope of the confidence reposed in them. *Dias vs. Owners of Revenge*, 3 Wash. C. C. R. 262.

The difficulty is to determine whether the act, in doing which the injury has accrued, be one that is within the scope of authority entrusted to the Master. In the case of *Palfrey vs. Kerr and others*, (8 Mar. Lou. Rep. N. S. 503,) the defendants, who were owners of a steamboat, resisted the claim of the plaintiff to damages resulting from the hiring of the plaintiff's slave by the Master of the boat without consent of the plaintiff, who was owner of the slave, on the ground that the act was an illicit one, and not within the scope of his agency. And of this opinion were the Court, who referred to the statute laws of Louisiana, which provided that he who hired a slave without the owner's consent should pay a daily compensation and all damages, and in case of his inability to pay, should be fined and imprisoned. From this the Court concluded that the act constituted a misdemeanor, for which the offender was liable in damages *civiliter*, and condemned to pay a fine to the State. The same position was taken by the same Court in the case of *Strawbridge vs. Turner*, 9 Lou. Rep. 213.

This distinction seems to be a sound one, and its adoption by the Supreme Court of Louisiana in the case of steamboats, by analogy to

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the responsibility of ship owners, will fully authorize the application of the principle in the present case. If the Captain of the Leavenworth has been guilty of stealing slaves, or of taking them on his boat, knowing them to be slaves, and transporting them to St. Louis, or elsewhere, he has been guilty of either a felony or a misdemeanor, for which his employers are not responsible. The law in force in 1840, when the occurrence took place which forms the ground work of this action, provided, that any Master, Commander, or Owner of any boat, or other vessel, who shall transport any slave out of this State in such vessel, without the consent or permission of the person to whom such slave does of right belong, or who has authority to grant such consent or permission, shall forfeit and pay one hundred and fifty dollars. This was without prejudice to the right of such owner to his action at common law. The act of Feb. 13, 1841, has somewhat increased the penalty. These statutes being penal in their character, must be strictly construed, and an unintentional violation of their provisions, we suppose, was not designed to be punished. The declaration in the present case charges a mere negligence, and not a wanton violation of the statute; the evidence tended to establish that the Captain of the steamboat was imposed upon by the slaves, by means of free papers, and was induced to take them as passengers on his boat, under the belief that they were free. This is not a crime or misdemeanor under our statute; but it may be a case of such gross negligence on the part of the Captain of the steamboat as to make the owners responsible for the damages which resulted.

As to the admissibility of Capt. White's declarations, it does not appear what their character was, or at what time they were made. Any admissions or declarations made by him, after the transaction, would be no evidence against the owners. They are bound for the actual conduct of Capt. White;—not for what he might say he had done. All declarations, therefore, made subsequent to the act, to which they relate, and out of the course of his official duty, should be excluded. But any thing said or done by Capt. White in the progress of his voyage whilst receiving the slaves on board, in receiving from them their passage money; in short, any thing which constituted a part of the *res gestæ*, would be clearly admissible.

The Circuit Court in the instruction given, put the responsibility of the owners entirely upon the fact of their participation in the trespass of the Master. As there was no evidence whatever on this head, and it was entirely immaterial whether the owners were personally concerned

*St. Louis Perpetual Ins. Co. vs. Maguire—same vs. Campbell. Abbott, Adm'r vs. Miller, Adm'r.*

in the illegal act or not, the judgment must be reversed, and the cause remanded.

ST. LOUIS PERPETUAL INS. CO. vs. JOHN MAGUIRE—SAME vs. ROBT. CAMPBELL.

See St. Louis Perpetual Insurance Co. vs. Cohen, 9 Mo. Rep. p. 421.

APPEAL from St. Louis Court of Common Pleas.

SCOTT, J., *delivered the opinion of the Court.*

The above cases are in all respects similar to the case of the St. Louis Perpetual Insurance Company vs. Cohen, decided at the last term of this Court, except that the garnishment was made at a time, when beyond all controversy the certificates of deposit were in the possession of the Mineral Point bank. The judgments therefore will be affirmed, Judge NAPTUN concurring.

JOHN C. ABBOTT, ADM'R. vs. MARTHA MILLER, ADM'X.

A. died intestate in the State of Illinois, leaving debts in that State, and also in this State. B. administered in the State of Illinois, and "as administratrix" insured the real estate of A., situate in Illinois, in an office in St. Louis in this State. The property being destroyed by fire, B. sues for and recovers the amount due on the policy. D. administers in this State on the estate of A., it being only the amount recovered by B. on the policy.

Held:—

That D. is not entitled to the amount recovered on the policy, but that the money belongs to B.

APPEAL from St. Louis Circuit Court, (in Chancery.)

SCOTT, J., *delivered the opinion of the Court.*

This was a bill in chancery which set forth the following facts: J. S. Miller died intestate in the State of Illinois; his wife, Martha Miller, the

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*Abbott, Adm<sup>r</sup>. vs. Miller, Adm<sup>r</sup>x.*

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defendant, administered in Illinois. Miller was indebted to persons residing in St. Louis county, in this State. M. Miller, the administratrix, insured at the St. Louis Floating Dock and Insurance Company, a corporation of this State, some real estate of the deceased husband, situated in the State of Illinois, to the value of \$2500. The property thus insured was destroyed by fire, a peril insured against. The premium was advanced out of monies belonging to the estate, and the policy was to M. Miller, as administratrix. Suit was brought in this State on the policy and judgment recovered. The complainant, Abbott, took out letters of administration in St. Louis county, in this State, on the estate of the said J. S. Miller. There were no other assets in this State, than the sum due on the policy. Debts against the estate of Miller were allowed in the Probate Court of St. Louis county in this State. The bill alleged that the securities of the administratrix were insolvent, and that she was squandering the estate. Its object was to subject the debt due on the policy to the payment of the debts due in this State, and it prayed for an injunction, and for relief.

The answer of M. Miller admitted all the material facts stated in the bill, but denied the insolvency of her securities and that she was squandering the estate. On a hearing, the bill was dismissed, and the complainant appealed to this Court.

We can see no grounds on which the complainant was entitled to the relief he sought by this bill. The fact that M. Miller could sue for and recover this debt without making any profert of letters of administration, is conclusive to show that she was the legal owner of it. A valid title to property acquired in one country, according to the local law, will be deemed valid, and respected as a perfect title in every civilized country. That M. Miller was a trustee for others can make no difference. But, take it that it would, in justice and equity ought not this debt to belong to the foreign administration in Illinois? The premium was paid out of funds belonging to the estate there; the property insured was in Illinois, and as it was consumed, the sum recovered on the policy should be regarded as an indemnity for it. M. Miller resided in Illinois. She there became the legal owner of a debt, and it is now settled that debts have no locality, but follow the person of their owner; and because she has been compelled to come into our Courts to assert her legal rights, would it not be the rankest injustice if this should lay hold of her property, and subject it to the claims of our citizens, when there may be as strong or stronger claims upon it in Illinois? There can be no pretence for saying that this debt belonged to the intestate, J. S. Miller. It was

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*Wood, Johnston & Burritt vs. Ruland.*

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not contracted until after his death. Place the evidence of it in the hands of the administrator in this State, and he cannot sue upon it in his own name, but only in the name of M. Miller. Story's Com. §514, and the following sections.

Judge NAPTON concurring, the decree of the Court below will be affirmed.

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WOOD, JOHNSTON & BURRITT vs. JOHN RULAND.

A recorder is not liable for giving a false certificate as to the title of property, unless such certificate be made fraudulently, or with a knowledge of its falsity.

### ERROR to St. Louis Circuit Court.

#### GAMBLE & BATES for Plaintiff in Error.

For the plaintiffs in error it is insisted that the principles upon which a person undertaking, without reward, to do an act which he was under no obligation to perform, is held bound by law for damages occasioned by his negligence, as in *Coggs vs. Bernard*, 2 Lord Raymond 909, applies to the present case.

And that there need be no other connexion between the defendant, and the act of Strother, in consummating his fraud, to make the defendant liable, than the wrongful act of the defendant in giving such certificate, as in the case of the *Squib*. 2 Black. R. 892.

#### SPALDING & TIFFANY, for Defendant in Error.

#### POINTS AND AUTHORITIES :

I. The instruction given on the trial was correct, as it merely puts it to the jury to require proof of a material allegation of the declaration. 1. That the allegation that the defendant knowingly and fraudulently made a false certificate, is a material one and must be proved, is apparent from the nature of the count, and from the following authorities: 2 Stark. Ev. 466, 467, 470; 3 Monroe's Rep. 218; 2 Bibb. 618; 12 East. 638, (note.) These cases and many others that might be cited, show that in declaring on a false warranty it is not necessary to allege or prove a *scienter*, but in declaring on the *deceit* it is necessary to allege the *scienter*, and prove it on the trial, &c. See also *Chandler vs. Lopus*, in Smith's leading cases 77, (45 Law Library 144,) in notes, that the *scienter* must be averred in the declaration *in tort*, on a false warranty and proved; and if not averred cannot be proved. But, secondly, no motion was made for a new trial, and therefore the Court will not review the questions arising on the trial of the issue of not guilty.

II. The demurrer was properly overruled, because the additional count was bad in law, as it sets forth no cause of action. 1. The additional count charges that the certificate was *erroneous* and



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false, not through the *fraud* or *knowledge* of Ruland, but by his *carelessness* and *negligence*. 2. The charge in the count, therefore, is that he made a false representation as to the title of that property, in writing, not *knowingly* and *fraudulently*, but by *carelessness* and *inattention*. 3. This count charges him with no statutory malconduct, as the acts in force did not make it his duty to give any such certificate; which certificate was not, therefore, an official act. Rev. Code of 1835, page 524, act establishing recorder's offices, and prescribing the duties of recorders. Ibid p. 270, §14, are the fees allowed to recorders, among which there are none for *searches*, and section 33 inflicts penalties for charging where not allowed by law. Acts of 1836-7, p. 62, are fees allowed to clerks of circuit courts for *searches of records*, but this does not apply to recorder's offices, as the provisions are distinct and separate, in the statutes, for the two offices. Rev. Code 1825, p. 288, fees are allowed to recorder for search, and also in Geyer's Digest, p. 189. 4. But for false representations no action lies unless the representations were intentionally false. If they were *bona fide* made, the party is not liable, though guilty of negligence and carelessness. 3 Term Rep. 51, *Pasley vs. Freeman*, is the leading case as to false representations. 2. East's Rep. 92. The defendant asserted that another person's credit was good from *his own knowledge*. Held that no action would lie if he spoke *bona fide*, as the foundation of the action is *fraud*, (vol. 21 and 42 Law Library,) 8 John. Rep. 23. Actual fraud or intention to deceive is necessary in such action. Rashness or indiscretion will not be sufficient. 6 Cowen 346; 1 Const. Rep. 1. To entitle plaintiff to recover in an action of deceit, fraud and damage must concur; and there must be some connection between the party doing the act, and the one suffering the injury. *Chandler vs. Lopus*, see Law Library, 17 vol. p. 61, and 41 vol. p. 145, in the notes to this case, where the doctrine as to false representations, is laid down that *scienter* knowledge of the falsity of the representations is necessary. (42 vol. Law Library 112-13-14; 2 vol. Smith's leading cases 70, in notes.)

III. The present case is to be governed by the doctrine applicable to false affirmations. 1st. It is merely a false affirmation *written*, and putting the official seal to it does not alter its character. 2d. It is thus considered in the only case analogous to it which I have been able to find. 11 Wend. R. 545. Unless there be fraud or evil intent, case will not lie against a justice of the peace, who by negligence or carelessness gives erroneous information as to the amount of a judgment rendered by him to the party about to prosecute an appeal, by means whereof the appeal is lost. 13 Ohio R. 157, *Ramsey vs. Riley, Recorder, &c.*

IV. This case is not analogous to that of voluntary bailees or agents, without reward, with which it is compared by counsel of plaintiff in error. Lord Raymond 909, *Coggs vs. Bernard*, is the leading case of this class. See 41 Law Library 158, Smith's leading cases and notes. 1st. That class of cases so far as decisions have been generally made, consists of bailments, undertakings to keep property for another, or do something respecting it, without reward; and the decisions make a liability in such case only in case of gross negligence. 2d. The present is not such a case. It is not the undertaking of one person to do the business of another, but is merely an attempt to furnish information by a person supposed to have it, who was mistaken. 3d. But even in such cases an agent without reward, is not required to possess all the skill requisite for the discharge of the commission undertaken. 1 H. Black. 158.

*Statement of the case adopted by the Court, and opinion by NAPTON, J.*

Wood, Johnston & Burritt, a mercantile firm in the city of New York, brought an action of trespass on the case *in tort* against John Ruland, the clerk and ex officio recorder of St. Louis county. The suit was commenced 28th October, 1840. The declaration originally contained two counts, which alleged with slight variations that one Reuben M. Strother

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procured the plaintiffs to accept his bills to a very large amount, on his making to them a deed of trust on a lot and house in St. Louis, to indemnify them; and that by way of inducing them to take said deed, and accept said bills, he showed them a certificate of said Ruland, under his hand and the seal of his office, in the following words :

STATE OF MISSOURI,        }  
 County of St. Louis,        } ss

I, John Ruland, clerk of the circuit court, and ex officio recorder within and for the county aforesaid, certify that I find upon the records of my office a deed made by Thomas J. Stewart to Reuben M. Strother, in fee simple, for a house and lot in the city of St. Louis, the lot being one hundred and fifteen feet front on Eighth street, by one hundred feet more or less; and I further certify that I have examined the said records of my office, from the third day of June, eighteen hundred and thirty, to this day, and find no no incumbrance whatever upon said property.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said Court, at office in the city of St. Louis, this twenty-sixth day of October, eighteen hundred and thirty-eight.

JOHN RULAND, Clerk and ex officio Recorder.

Both counts allege that relying on the truth of this certificate, they accepted the bills of Strother, on his pledging the lot and house to reimburse their advances; and that those acceptances amounted to nine thousand dollars; and Strother being indebted to them in that amount, which they had to pay, they sold the lot and house under their deed of trust, and it brought only a thousand dollars, or thereabouts, and that the reason why it did not bring more was the fact of a mortgage, which encumbered said lot, dated 28th October, 1836, executed by Thomas J. Stewart, the then owner of said house and lot to one James Clendening, for the sum of \$5,600, payable four thousand dollars in five years from the date of said mortgage, and the residue in five equal annual instalments from said date, which mortgage was recorded on the 2d January, 1837. Those counts then proceed to allege formally that the defendant, "well knowing that the said mortgage was of record as aforesaid, and still unsatisfied and unredeemed, but contriving and fraudulently intending to deceive and injure the said plaintiffs, falsely and fraudulently signed, and gave and delivered the said certificate to the said Strother, on the 26th day of October, 1838," &c.

The plea of not guilty was filed to these counts; when the plaintiff filed an amended count, based on the same facts. This count differs from the others by alleging that the defendant, by mere *carelessness* and *neg-*

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*ligence* made and delivered the certificate, and does not charge a *scienter*.

A plea of not guilty was filed to the additional count, and also a special plea setting forth that before the said certificate was given, to-wit, on 3d June, 1837, said Strother and wife made a deed of trust on said lot to one Evans, trustee, for the purpose of securing the payment of said money, mentioned in the said mortgage, to Clendening, and that afterwards on the 29th September, 1838, made his deed of release of said tract, stating that *all its conditions and stipulations had been complied with*, which was duly acknowledged and recorded in the same year, by which release, he, said Evans, conveyed said lot to said Strother, and discharged it from the trust. This plea was demurred to, and on the argument of the demurrer, the Court held the count bad, and for that reason overruled the demurrer.

A trial was afterwards had on the two original counts, upon the plea of not guilty. The plaintiff gave in evidence the certificate of Ruland, copied above, under the seal of the Court; also the record from the recorder's office of St. Louis county, of a mortgage of T. J. Stewart to J. Clendening, dated the 28th October, 1836, on a lot in St. Louis, forty feet in front on Eighth street, by one hundred feet, more or less, in depth on Washington Avenue, and on which was a two story brick dwelling house, being part of a larger lot conveyed on that day, by said Clendening, to said Stewart; which mortgage was conditioned for the payment of a note of that date of said Stewart to said Clendening, for \$4000, in five years, with interest from date, at eight per cent. per annum, interest payable annually. The mortgage was duly acknowledged on the 29th October, 1836, and was filed for record on the 23rd Nov'r, 1836, and actually recorded on 2d January, 1837, in book Y, page 477. The original index of the recorder's office was produced and given in evidence, showing that this mortgage was correctly indexed as being at page 477 of that book. The plaintiffs further proved by depositions taken in New York, of the clerks of plaintiff, that R. M. Strother drew on the plaintiffs, who accepted, for the sum of \$7,890, all which acceptances the plaintiffs paid, and that the only credit to which Strother was entitled, was the sum of \$918 50, or thereabouts, being net proceeds of the sale of the lot and house by the trustee, John Wood; that said acceptances were given in March and April, 1839, and were paid during the summer of that year; and that the plaintiffs were merchants doing business in the city of New York; that the trustee in said deed of trust, John Wood, sold the property, the house and lot, according to the deed

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of trust, on the 12th September, 1839, for \$1000, which paid expenses, and left the above balance of \$918 50 as a credit as aforesaid.

• The said deed of trust was also read in evidence, dated 28th February, 1839, made by R. M. Strother and wife to John Wood, trustee, for the benefit of plaintiffs, to secure all his indebtedness and liabilities to them, in which was conveyed a lot in St. Louis, one hundred and fifteen feet front on Eighth street, by one hundred feet, more or less, deep, being same premises conveyed by T. J. Stewart and wife to R. M. Strother, by deed of October 28th, 1838. This deed contained an authority to sell on six week's notice, in New York city, if Strother should make default in the payment of any claim or demand of the plaintiffs on him. This deed was filed for record on 30th March, 1839. It was further proved by plaintiffs that soon after the sale of said property, the acceptances taken up by the plaintiffs were sent to Thomas Skinker, of St. Louis, in order to obtain a settlement from Strother. Those acceptances were delivered to Strother on his executing his note for \$9,104, on which he confessed a judgment in favor of plaintiffs on the 18th November, 1839, in the St. Louis Circuit Court. An execution on this judgment proved unavailing, and Strother having been arrested on it, took the benefit of the insolvent act. A stay of execution on that judgment was given till 1st May, 1840. Skinker further stated that plaintiffs did not request him to examine the title of said lot, prior to the acceptance of said bills of Strother, and that no such request was made to him until May or June, 1839. Plaintiffs then examined said Strother as a witness, who testified that he purchased the lot described in said certificate, in 1837, and gave his notes to Stewart therefor; that he paid the first note, and gave a deed of trust to A. H. Evans, as trustee, to receive the balance; he afterwards went to Evans and requested him to release the deed of trust, giving him evidence that he had paid the debt, and accordingly a release was executed by said Evans. He further stated that he requested Ruland to give him a certificate as to the title of the property, which Ruland said should be done; and that he called the next day and the certificate was not made, Ruland saying that the clerks were all busy as it was just before Court; that Ruland then made the examinations of the record himself, he (Strother) remaining in the office while he did it, and he then gave witness the certificate, which he took and went immediately to a boat that was waiting for him, and thence to Natchez and New Orleans, which was in October, and in January he went round to New York, where he arrived early in February, and then called on the plaintiffs, with one of whom, Wood, he had been previously acquainted

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in Virginia, and had had considerable business; after some negotiation, the plaintiffs agreed to accept for him, on the security of the property mentioned in the certificate, on condition that Mr. Skinker should approve the security. The certificate was exhibited to the plaintiffs. It was agreed that Skinker should investigate and approve the security on the return of Strother to St. Louis, that he should be satisfied on the subject of the security, and then they were to accept to the amount of \$10,000. He stated that the lot of forty feet, embraced in the mortgage, would include the house and improvements on the lot he purchased from Stewart. He said further, that Ruland at the time that he gave said certificate examined the books himself, and he, Strother, remained in the office while he did it; that the deputy clerks were busy, and that was the excuse given why the examination had not previously been made; that no conversation took place between him and Ruland at the time of giving the certificate, and no person knew what was the object of witness in getting the certificate; that the office was full of persons at the time; that he, Strother, wanted the certificate for the purpose of getting security, but no person knew, nor did he himself then know that he would go to New York at all; that plaintiffs had no other security for their debt, though he believes that they would have made him limited advances without any security. He further testified that he had no acquaintance before or since giving the certificate, with Ruland, except a mere passing acquaintance; that Ruland had no acquaintance with the plaintiffs, nor they with him, so far as he (Strother) knew; when the certificate was shown to plaintiffs, the name of *Ruland* was not mentioned. That he (Strother) had never been in Ruland's office before he applied for said certificate; that he did not say any thing to Ruland about incumbrances; that he did not think that Ruland was prompted by any interested or other motive to make an erroneous certificate; that the certificate was obtained at his (Strother's) instance alone.

The deed from T. J. Stewart to Strother, was given in evidence by plaintiffs, dated 3d June, 1837, conveying the lot of one hundred and fifteen feet by one hundred feet, for \$11,354 21, which was recorded 12th September, 1837.

The defendant Ruland gave in evidence the deed of trust from R. M. Strother to A. H. Evans; to secure the payment of the purchase money of said lot, amounting as aforesaid to \$11,354 21, as follows, viz: To pay the notes mentioned in the mortgage from Stewart to Clendening, and the balance to pay to said Stewart; for which also notes were given; and it was provided that said deed should be released when all of said notes



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were paid. This deed was dated 3d June, 1837, and filed for record on the 7th of the same month.

Defendant also gave in evidence a deed of release, dated 29th September, 1838, executed by A. H. Evans to said Strother, reciting said deed of trust, and stating that the conditions and stipulations in said deed had been fully complied with by the said Reuben M. Strother, and releasing and quit claiming said property to Strother, which was duly acknowledged and was filed for record on 2d October, 1838.

This was all the testimony. The Court then, at the instance of the defendant, gave the following instruction, which was excepted to by plaintiffs: "Unless the jury believe from the evidence that the defendant knew at the time he made the certificate, given in evidence, that it was false, they are bound to find for the defendant."

A verdict was found for defendant. There was no motion for a new trial.

The third or additional count, which was held bad on demurrer, sets forth the facts, substantially as in the others, of the making the certificate by Ruland, then clerk of the circuit court and ex officio recorder, and of the delivery of it to Strother, and that Strother, by means of said certificate, procured the plaintiffs to accept from him a deed of trust of said house and lot, in trust, to sell the same to indemnify the plaintiffs, the indebtedness and default of Strother, and sale of said lot for \$1000, and the existence of said recorded mortgage, and of its being of record before the making of said certificate, and an incumbrance on said lot. This count then alleges "that by mere negligence and carelessness the said defendant made and delivered to the said Strother, the certificate aforesaid, &c., and that by means of that carelessness and negligence, they, the said plaintiffs, have suffered damage to the amount of \$8000, &c."

The only question in this case is, whether the defendant, who was clerk of the Circuit Court of St. Louis county, and ex officio recorder, is responsible in damages for the false certificate given by him in relation to the condition of Strother's title, without an averment and proof that such certificate was fraudulent as well as false. The count, to which there was a demurrer, placed the liability of the defendant upon the allegation of negligence and carelessness, without averring any *scienter*. The case of *Coggs vs. Bernard*, is relied on to sustain this count, and the present case is likened to that of unpaid agents, who undertake to keep, or carry, or perform something, and whose responsibility in case of loss is fixed by gross negligence. If the present could be regarded as a case of bailment, in which the defendant is supposed to have undertaken to look into the

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title of Strother, at the instance of said Strother, it is difficult to perceive upon what principle any other than Strother could maintain the suit. Viewing the action in this light, might we not also hesitate to hold a clerk or recorder responsible for even ordinary skill in ascertaining the legal effect of conveyances and reporting how far they constituted incumbrances upon real estate?

But it is quite apparent that the third count does not go for damages occasioned by gross negligence, as in case of gratuitous bailees. The case is one of false representation, and must fall within the principle of the case of *Pasley vs. Freeman*. That case settled the doctrine that false affirmations, occasioning damage, to constitute the ground work of an action, must also be fraudulent, or made with a knowledge of their falsity. The gist of the action is the fraud, and the affirmation is the means by which the fraud is effected.

The case of *Wickward vs. Bryan*, (11 Wend. 546,) is quite analogous to the present. The Court there held a justice of the peace not liable for negligence and carelessness in giving erroneous information as to the amount of a judgment rendered by him, whereby an appeal was quashed for variance between the amount of the judgment specified in the appeal bond and in the justice's return. This was upon the ground that the statement made by the justice was not an official act, for which he was responsible for an unintentional mistake; though it was unquestionably proper for the justice to give the information and give it correctly. So in the present case, it was clearly the duty of the clerk to afford every facility for searching the records in his office, and if he chose to perform the search himself, it was proper that he should do it diligently and report correctly. Yet it is a service for which he is not allowed any fee by law, and it is not a duty imposed upon him by any statute. In making this search himself, he does not make himself any more responsible for its accuracy, than any other person would who might make it at the request of the one who desires the information.

The judgment of the Circuit Court is affirmed.

## JULY TERM, 1846.

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### IVY vs. BARNHARTT.

An action of trespass will not lie against a party for suing out an attachment, although the debt on which the suit was founded, was not due at the commencement of the suit.

### APPEAL from Camden Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

Barnhartt brought an action of trespass against Ivy for suing out of a Justice's Court and levying an attachment on his goods and effects. Ivy pleaded not guilty, and a justification under, and by virtue of a writ of attachment in a suit commenced and prosecuted by him against Barnhartt, in which he recovered judgment. Barnhartt replied that the debt, for the recovery of which the suit was commenced, was not due at the commencement thereof. There was a demurrer to this replication, which was overruled, and judgment was taken on the demurrer. The parties going to trial on other issues, there was a verdict for the plaintiff for \$55 33. There are many other matters in the record, but the facts above stated are sufficient to show the point, and the only point in the cause.

It is difficult to imagine the principle on which an attempt is made to support an action of trespass on the facts of this case. The rule is stated in Chitty, 136, whenever an injury to a person is effected by regular process of a Court of competent jurisdiction, case is the proper remedy; trespass is not sustainable. There is a class of cases, in which it is held, that case and trespass are concurrent remedies, as when the

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*Ivy vs. Barnhartt.*

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proceeding is in a Court having no jurisdiction, and is malicious and unfounded. Of this class is the case of *Goslin vs. Wilcock*, 2 Wil. 302. Leigh's N. P. 548. Lord Camden in delivering his opinion in the case of *Goslin vs. Wilcock*, remarks, that there are no cases in the old books of actions for suing when the plaintiff had no cause of action; but of late years when a man is maliciously held to bail when nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie; because the costs in the case are not a sufficient satisfaction for imprisoning a man unjustly and putting him to the difficulty of getting bail for a larger sum than is due. Whenever this kind of action is brought, the particular *gravamen* must be alleged in the declaration, and it must be laid that it was done maliciously and with an intent to injure and oppress. See 1 Sal. 14. Butler, 12—13. So I suppose an action on the case would lie against a plaintiff for maliciously suing out an attachment against a defendant's goods and effects. The Justice clearly had jurisdiction of the subject matter of the process, and the person; and an error committed by him in the exercise of a jurisdiction, with which he is, beyond all question, vested, cannot make him, or the party suing out the process, a trespasser. The evidence in the cause is not preserved in the bill of exceptions, and we are at a loss to ascertain how the question as to the maturity of the note arose. We can well conceive cases in which it would be a question of difficulty, and about which a difference of opinion might well exist, whether a note was due or not. To hold that a Justice of the Peace, and the plaintiff in a case in which the Justice had jurisdiction, would be liable to an action of trespass for an erroneous judgment of the Justice, would be sowing the seeds of litigation broadcast, and effectually close the doors of those Courts against all suitors, as few would accept the justice dispensed to them on such terms. In cases in which the Justice has jurisdiction, for all substantial errors committed by him, the law has afforded a redress to the party injured thereby by an appeal. An original action against the officer or party is not contemplated by the Legislature as a mode of redress.

The other Judges concurring, the judgment is reversed, and the cause remanded.

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*Johnson vs. Lewis.*

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## JOHNSON vs. LEWIS.

1. J. gave his note to L. for fifty dollars, part of the price of an improvement on the public land. The vender warranted and defended "said claim from all future claims or preemption rights, and if any future claim should preemption the claim, to pay the vendor \$300." The claim was supposed to contain 160 acres. Held, that evidence that the claim was divided by the Platte River, and that the land officer refused to permit J. to enter the portion on one side of the river does not shew a failure of consideration.
2. If J. have any remedy, it is on the warranty.

## ERROR to Platte Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

In September, 1844, Johnson sued Lewis on a note for fifty dollars, by petition in debt in the Circuit Court of Platte County, by which Lewis promised to pay Johnson fifty dollars, to be discharged in hemp and pork at the market price. The note, it seems, was given as part of the price of an improvement on the public lands supposed to be a quarter section, the entire price of which was \$300. The vender of the improvement warranted and defended the "*said claim from all future claims or preemption rights, and if any future claim should preemption the claim,*" the vendor bound himself to pay the vendee \$300. Lewis, under notice, gave evidence that the improvement sold to him was divided by the Platte river. He had been put in possession of the whole tract, but that upon applying to enter the portion of it lying on the opposite side of the river, he had been refused. Under instructions from the Court, the jury found for the defendant, and the plaintiff has appealed to this Court.

The reason for the finding was, that there was a failure of the consideration of the note. We do not conceive that there was any failure of the consideration. The defendant, Lewis, was put in possession of the entire improvement which he purchased from Johnson. It does not appear but that he could have entered the land had application been made in time. Nor does it appear that another had any preemption on the claim. The wilful refusal of the officer to permit Lewis to enter the land cannot affect Johnson. The only injury Lewis has sustained, if any, has resulted from a breach of the warranty made by Johnson, for



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*Garth vs. McCampbell, et. al.*

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which he may bring his action. There is nothing in the record showing any failure of consideration.

The other judges concurring, the judgment will be reversed, and the cause remanded.

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JEFFERSON GARTH vs. JAMES McCAMPBELL, ET. AL.

A Sheriff who, out of his own funds, satisfies an execution, can not afterwards have an execution issued on the same judgment for the repayment of the money so paid by him.

### ERROR to Callaway Circuit Court.

*Todd, for Plaintiff in error :*

#### POINTS AND AUTHORITIES.

1. The Court will permit amendments to show the truth of facts upon all writs of execution. 3 Mars. 350, in lieu, see 2 Pirtle's Digest, p. 224, §114.

2. The fact that the officer is to be benefitted or injured by the amendment, will not control the discretion.

3. This motion is an equitable one, and the Court will substitute an officer for the plaintiff where he has, *even by negligence*, been compelled to pay money for defendants in an execution; and will permit him, with plaintiff's consent, to use the execution to recover the money. 1 Litt. 137. 5 Mon. 128. 9 Mo. Rep. 45 and seq.

*JAMISON & HARDIN, for Defendant in Error :*

#### POINTS AND AUTHORITIES.

1. A motion should have been made and entered of record on the day on which defendants were notified to appear in Court.

2. Parties to an execution ought to be concluded by the return of the Sheriff. 3 Mon. Repts. 350. Caldwell vs. Harlin, 1 Lit. Rep. 17.

3. If a Sheriff or other officer to whom an execution has been directed, makes payment of the same, it cannot afterwards be levied on the goods of the debtor for the benefit of him who made the payment; such payment being in law a full discharge of the execution and a satisfaction of the judgment. 7 John. Rep. 426. Reed vs. Pruyn and others, 9 Mass. Repts. 138. Hammatt vs. Wyman, 17 Mass. Rep. 153. Brackett vs. Windum, 3 Lit. Repts. 131—2—3. 9 Mo. Repts. Baily vs. Gibbs, 45.

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*Garth vs. McCampbell, et. al.*

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SCOTT, J., *delivered the opinion of the Court.*

Garth recovered a judgment against McCampbell, the Sheriff of Callaway County, and his securities. An execution was issued on the judgment and placed in the hands of Bailey, the Coroner. Influenced by the representations and promises of others, and believing that the money would be paid, Bailey returned the execution, "satisfied by order of the plaintiff's attorney" without having received the money. Finding that his return rendered him liable for the debt, Bailey satisfied it. He then made a motion, which is the ground work of the proceeding, to amend his return, so that the execution may not appear to be satisfied, and so that in the name of Garth, he may have execution against McCampbell and his securities. This motion was overruled, and the cause is brought here.

It is clear that when an execution has once been satisfied, the judgment, which was the foundation of the writ, becomes extinguished, and can no longer be made the ground work of any process. If a Sheriff has an execution against a defendant, and satisfies it with his own money, he cannot afterwards use it against him. The writ is *functus officio*. His remedy is an action for the money advanced. Bailey admits that the execution of Garth has been satisfied. Then the judgment is extinct, and cannot be the foundation of another writ. *Reed vs. Pruyn and Staats*, 7 John. 426. The matter in controversy between these parties, was before this Court in another shape in the case of *Bailey vs. Gibbs*, 9 Mo. Rep. The party failed then because as the case appeared to the Court, one was endeavoring to compel a surety to refund money which he had paid for the principal. Bailey paid money for McCampbell, the Sheriff. No doubt McCampbell is liable to him for it. But on what principle was Gibbs liable to him who advanced the money, he being a mere surety for McCampbell? So that a recovery cannot be had against McCampbell's securities without sustaining the principle that a person who voluntarily pays the debt of a principal, may recover the sum paid from a security for that debt, which is directly against law. *Yoder vs. Briggs*, 3 Bibb, 228. *Elmendorf vs. Tappen*, 5 John. 176.

The other Judges concurring, the judgment will be affirmed.

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*Hassinger vs. Pye.*

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WILLIAM HASSINGER vs. WILLIAM R. PYE.

A bill of exceptions can not be signed after the term at which the judgment was rendered, except by consent of parties.

## ERROR to Marion Circuit Court.

*WELLS for Plaintiff in Error.*

## POINTS AND AUTHORITIES.

1. The report of the arbitrators was no lawful award. It should have found for one or the other party, and not found a special state of facts.
2. The arbitrators did not find sufficient facts to warrant a judgment for plaintiff. They did not find the note to have been assigned for a valuable consideration. 7 Monroe 605.
3. They found some evidence of insolvency in the maker of the note; but at the same time found that evidence to be false, and that he was abundantly solvent.
4. If the report of the arbitrators was good at all, it was sufficient to warrant a judgment for defendant. If not good, the judgment is erroneous, having nothing to rest upon.

*GLOVER & CAMPBELL for Defendant in Error.*

## POINTS AND AUTHORITIES.

1. The bill of exceptions was improperly allowed, and is a nullity. The Circuit Court having no power to sign a bill of exceptions after the close of the term. It is, therefore, out of the case.
2. The report of the 8th September, 1842, was not received by the Court; at least such is the presumption, as no action of any sort appears to have been taken upon it. The report of August 9th, 1843, is well enough; and, though the proceeding appears to have been very irregular, yet as the defendant "*appeared*," and took no exception, nor in any way opposed judgment, it ought now to stand.
3. The record shows a series of "indulgencies" on the part of the plaintiff, and vexatious delays on the part of the defendant, from first to last, which robs him of all claim upon the equity of the Court to a new trial.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of assumpsit brought by Pye against Hassinger, in which the plaintiff recovered.

It appears that the cause was referred, and a report was made. After the making of a report by the referees, the judgment was entered by the Court. An appeal was prayed, and a bill of exceptions was filed at a

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*Hensley vs. Baker.*

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time subsequent to the term at which the judgment was rendered. It does not appear that this was done by the consent of the parties. The defendant in error objects that the bill of exceptions was taken at a time when it was not authorized by law. This objection is well taken. Without the consent of parties no bill of exceptions could have been signed after the term at which the cause was finally disposed of. The bill of exceptions being stricken out, there is nothing in the record showing error in the proceedings. The judgment will be affirmed, the other Judges concurring.

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SAMUEL HENSLEY vs. ROBERT E. BAKER.

1. In sales by Sheriffs there is no implied or express warranty of the title or soundness of the goods sold. The rule *caveat emptor* is applied to all such sales.
2. In a proceeding against a purchaser at a Sheriff's sale who refuses to pay the amount bid by him, for the difference between his bid and the amount for which the property sold at a subsequent sale by the officer, the return of the Sheriff is competent evidence.
3. The party has no right to have such motion tried by a jury—though the Court may order one if it desire one.

APPEAL from Callaway Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

Baker, the Sheriff of Callaway County, by virtue of an execution against Jos. D. Johnson, levied on and sold on the 4th July, 1845, a negro man slave, the property of the said Johnson, when Samuel Hensley became the purchaser for the sum of \$303, who refused to pay the amount bid by him on the ground that the slave was unsound; thereupon the Sheriff again offered the slave for sale, when he sold for the sum of \$252. This was a proceeding commenced by virtue of the 42nd section of the act concerning executions, to recover from Hensley the difference between the sum bid by him on the first sale, and the sum for which the slave sold at the last auction.

It appears that the slave, in the summer of 1831, was wounded by a cut on the under part or calf of his leg. This wound was never healed. It would occasionally fester and run. At times the slave complained of it, and it prevented him from doing full work. The purchaser of the slave at the last sale, said he would not take one hundred dollars for his

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bargain; that the slave had lost no time since he had him in consequence of the sore, and that it had healed up. The slave was present at the sale, and his leg examined. The Sheriff was heard to say that nothing was the matter with the leg but the scratch of a brier. Hensley was told of the hurt the slave had received, though he was at the same time informed that the wound was healed. This information was derived from one of the plaintiffs in the execution, who said he had known the slave all his life.

The defendant, Hensley, demanded a jury to try the motion; but the Court refused, and directed two issues to be tried, namely, whether the slave was constitutionally unsound, and whether the plaintiff in the execution and the Sheriff had practised a fraud on the defendant in the sale. These issues were found against Hensley, and judgment for the difference between the sums bid at the sales was entered against him. The defendant excepted to the refusal of the Court to permit a jury to try the motion, and also to the issues directed, and to the reading of the return of the Sheriff, which disclosed the facts on which the motion was predicated.

The statute directs that this proceeding shall be by motion. *Hart vs. Robinett*, 5 Mo. Rep. 11. It is not usual to call juries to try the truth of the facts on which motions are predicated. It is obvious that such a course will involve a Court in interminable confusion. It might have ten juries at one time in the same cause. In such proceedings a jury cannot be demanded as a matter of right. Courts possess a discretion in relation to such matters. When a fact is important and much contested, although it is involved in a motion, a Court may take the advice of a jury upon it. The refusal of a Court to grant an issue to try a disputed fact involved in a motion, would not be error, nor would the directing an issue unless the Court should suffer the verdict of the jury improperly to control its judgment.

We can see no objection to the admission in evidence of the Sheriff's return. A return by the Sheriff being the act of a public officer, is evidence against third persons. So that the Sheriff's return that he has levied, is it seems evidence of the fact against third persons. *Gyfford vs. Woodgate*, 11 E. 297. 3 Stark. 1357.

From the view we take of this subject, the issues directed were immaterial. We hold that beyond all question the rule *caveat emptor* applies to Sheriff's sales. In such sales there is no implied warranty of soundness, nor title by the officer. The law does not empower him as officer to make any warranty. This subject was discussed in the Su-



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preme Court of the United States in the case of the Monte Allegre. It was there held that in judicial sales there was no warranty express or implied. That the proceedings were hostile to the true owner of the goods, which are taken against his will, and exposed to sale without his consent. And it would be great injustice to make him responsible for the quality of the goods thus taken from him. Nor can the marshal or auctioneer, while acting within the scope of his authority, be censured, in any respect whatever, as warranting the property sold. The Marshal, from the nature of the transaction, must be ignorant of the particular state and condition of the property. He is the mere minister of the law to execute the order of the Court, and a due discharge of his duty does not require more than that he should give to purchasers a fair opportunity of examining and informing themselves of the nature and condition of the property offered for sale. The Marshal, as an officer to execute the orders of the Court, has no authority, in his official character, to do any act that shall expressly or impliedly bind any one by warranty. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress.

The foregoing doctrine was held in a case in which tobacco had been sold under an order of the Court. The application was made by the purchaser to be relieved from his purchase (the money still being in Court,) on the ground of the unsoundness of the tobacco, which was alleged had been sold by sample. The same principle is maintained in the American law journal, 4 vol., 137. That an officer may render himself liable by fraud or warranty, we think very clear. But then the recourse must be against him personally, and not such a one as affects the rights of the defendant in the execution. In the case of Peto vs. Blades, 5 Taun., it was held that in a sale by a Sheriff, there was an implied warranty, that he did not know that the title to the goods was defective. The same principle is maintained in the case of Saunders vs. Pate, 4 Ran. 8.

The other Judges concurring, the judgment of the Court below will be affirmed.

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*McDonald vs. Jacobs.—Poteet vs. Boyd.*

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WILLIAM W. McDONALD vs. HENRY JACOBS.

See 8 Mo. Rep. 565.

## ERROR to Ray Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

This case was before this Court formerly, and is reported in the 8th vol. Mo. Rep. 565. It was then held that a transcript of the justice's judgment having been filed in the office of the clerk of the Circuit Court, an execution should have been issued, and proved unavailing before the assignee was entitled to any recourse against the assignor. The evidence produced on the last trial, does not obviate the objection that was then taken. It does not appear that the execution ever reached the hands of the sheriff to whom it was directed. It was placed in the hands of one who promised to mail it. It does not appear that the postage was paid on the letter, or that it was ever put into a post office.

The other Judges concurring, the judgment will be affirmed.

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JOHN POTEET vs. HUGH BOYD.

In an action on a bond given to dissolve an attachment, a notice of special matter, "under the plea of *non est factum*, alleging "that the appeal had been taken to the Supreme Court and allowed," is insufficient. It should allege that "the appeal was pending and undetermined."

## APPEAL from Polk Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of debt brought by Poteet against Boyd, on a bond for the dissolution of an attachment. Boyd, who was the surety in the bond, pleaded *non est factum*, and gave notice of special matter; which

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was, that an appeal to the Supreme Court from the judgment rendered on the attachment suit had been prayed and allowed.

There is no assignment of errors in this cause, and upon an examination of the record we are satisfied that the judgment is correct. The only plea was *non est factum*, which was disposed of by reading the bond declared on. The truth of the breach of the condition of the bond was not denied, and the notice of special matter was insufficient, as it did not aver that the appeal was pending in the Supreme Court, and undetermined at the commencement of the suit. The contrary is the fact as appears by the record.

The judgment is affirmed, the other Judges concurring.

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JAMES G. GARRED vs. MACEY & DONIPHAN.

1. An agreement between A. and B., under seal, provides that in consideration that A. shall give possession of certain public land to B., B. shall pay the value of the improvements to be ascertained by five householders, &c.

Held,—

That the decision of the persons thus selected is not an award upon which an action can be brought.

2. The party can only recover on the agreement.
3. It being agreed that A. should give possession of the lands, and thereupon B. should pay the amount thus ascertained, A. must either shew an actual delivery of the possession, or an offer to deliver, and a refusal to accept by the other, before he can recover. A mere offer to deliver is not sufficient.

ERROR to Platte Circuit Court.

*JONES for Plaintiff in Error.*

POINTS AND AUTHORITIES.

1. That the third count of the declaration is substantially good. 1 Chitty's Pl. 244, 356-7.
2. That plaintiff ought to have been permitted to have withdrawn his demurrer to the second plea of defendants, and file a *similiter* thereto. Rev. Statute Mo. 467, §1; 1 Mo. Rep. 191; 7 Mo. Rep. 320; 4 Mo. Rep. 423.
3. That an award may be given in evidence upon an *insimul computassent*. 21 Pick. 249.
4. That if the award is invalid, then the plaintiff was entitled to a verdict against Macey on the common counts.

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5. That defendant's plea of *nil debet* to the second count of the declaration is bad; the count being founded, in part, upon a bond with collateral conditions. 7 Mo. Rep. 194; 1 Chitty's Pl. 518.

**DONIPHAN & BALDWIN, AND LEONARD & BAY, for Defendants in Error.**

## POINTS AND AUTHORITIES.

1. The Court committed no error in sustaining the demurrer to the first and third special counts. The delivery of the possession by the plaintiff and Ira Garred to Macey, was a condition precedent to the payment of the value of the premises under the award; and a performance should have been alleged or an excuse given for the failure to do so. See Chitty's Pl. §354; 1 Bibb's Rep., Shepperd vs. Hubbard, 494. The allegation of performance of that precedent condition, or an excuse for the failure to perform it, has not been made either in the first or third count; but a substitute has been interposed, which clearly does not amount either to an allegation of performance in the terms of the condition, or an excuse for the failure to perform. Boling vs. Ewing, 3 Marshall's Rep. 618. If the Court should look upon the covenants here as mutual and dependent covenants, we think the counts are still bad, as there is no time fixed at which the possession was to be delivered by plaintiff, and as he was in the possession, to make these counts good, he should have averred not only a readiness and willingness, and offer to deliver possession, but he should have averred specially, further, that defendant Macey had notice thereof. See 1 Chitty's Pl. 361-2 side. And also in the third count, in addition to the above, he should have averred a readiness.

2. The plea of *nil debet* to the second special count, is good, and the demurrer was properly overruled to that plea. 1 Chitty's Pl. 517-18; 2 do. side 395, note H; 1 Saunders on Pleading and Evidence, p. 181, pleas in award. It will be remembered that this suit is an action of debt on the award, and the bond here must be but inducement to the action.

3. The Court did not err in refusing permission to withdraw the demurrer to the plea of *nil debet* to the second special count after the record was made up and signed, which becomes from that time a judgment. See Jones vs. McDowell, 4 Bibb's Rep. 190; 3 Chitty's General Practice, side 761. Under this point it is contended that the Court erred in refusing to hear evidence of merits on the motion to withdraw demurrer. The Court did not err in this opinion, because the fact of the merits could only be got before the Court by affidavit, and the Court would not go into the whole case upon a motion to withdraw a demurrer, which would be the consequence of letting in evidence of merits on such a motion.

4. The Court did not err in refusing to permit the award to be given in evidence under the issues upon the three common counts; *first*, because it was inapplicable to those counts, or either of them; *secondly*, because the award was not attested by a subscribing witness, as required by statute. See Rev. Statutes 71, §6.

5. The Court properly refused the instructions asked by the plaintiff. They call upon the Court, in effect, to tell the jury they must believe the evidence. See 8 Mo. R., Vaulx vs. Campbell, 224; Bryant vs. Ware & Hickman, 4 Mo. R. 106. Besides they were not predicated upon any evidence in the case.

**SCOTT, J., delivered the opinion of the Court.**

Garred, who was plaintiff below and plaintiff here, sued on an award made under the following sealed instrument, viz: "This agreement, made and entered into this 31st day of October, 1843, by and between Wm. M. Macey, of the first part, and James G. Garred and Ira Garred, of the

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second part, witnesseth; that whereas the said J. G. Garred has made certain improvements on the southwest quarter, sec. 4, town. 51, in range 35, in the county of Platte; and whereas the said Jas. G. and Ira, are both settlers upon the said quarter, as well as the said Macey; now, therefore, the said Jas. G. and Ira Garred do, by these presents, transfer and convey unto the said Macey, and his heirs and assigns forever, all right of pre-emption which they hold upon, or to the said land, for the consideration hereinafter set forth; and the said Macey, as principal, and A. W. Doniphan, as his security, do by these presents bind and oblige themselves to pay to said James G. Garred, the value of all the improvements that the said Garred has put upon the said lands, to be paid whenever they deliver the entire and full possession thereof to the said Macey; and it is agreed between the said Macey and Garred, that the value of the said improvements is to be ascertained by the award of five respectable housekeepers of Platte county, who are not related to either of the parties, and who do not reside within three miles of said land; two of the said appraisers to be selected by James G. Garred, and two by Macey, and the fifth one by a majority of the said four, who shall be sworn before a justice of the peace, and their award shall be final, and shall be paid when the possession is delivered as aforesaid. Such valuation shall be made before the first day of December, 1843. Given under our hands and seals," &c.

The declaration was filed in September, 1844, and contained three special counts. The first count, after setting out the award which was made in conformity to the agreement of the parties, avers that the plaintiff and Ira Garred were ready and willing, and offered to deliver to the said Macey the full and entire possession of all of said quarter section of land, if the defendants would pay the amount awarded as the value of the improvements. The second count avers that full and entire possession was given, according to the terms of the agreement; and the third avers that the plaintiff offered the full and entire possession of the quarter section to Macey, and that neither the plaintiff, nor Ira Garred, nor either of them, nor any other person, by their authority, has lived upon the said land, or been in possession, or had the control of the same. There were also the common counts in the declaration. To the first and third counts, there was a general demurrer, which was sustained by the Court; and the pleas of *nil debet*, *non est factum*, and a special plea were filed to the second count. The special plea denied the delivery of the possession averred in the count. *Nil debet* was pleaded to the common counts. There was a demurrer filed to the plea of *nil debet*, pleaded to the



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second count, which was overruled, and judgment entered on the demurrer. The plaintiff afterwards asked leave to withdraw his demurrer to the plea of *nil debet*, pleaded to the second count, which was refused. The cause was submitted to the Court, sitting as a jury, and the plaintiff offered to read in evidence the appraisement of the arbitrators, showing that they estimated the value of the improvements at \$494 13, which was excluded by the Court. The plaintiff then asked the Court to instruct the jury that he was entitled to recover against the defendant, Macey, the value of the improvements put upon the land by the plaintiff, which was refused, and the plaintiff suffered a non-suit, and has brought the case to this Court.

The first question arising on the record, which we will consider, is whether plaintiff's action was properly brought or not. Whether the appraisement made by those termed arbitrators was really an award, such as would justify an abandonment of the agreement of the parties in declaring and warranting a declaration on it alone; or whether it was not an agreement under seal to pay for land, at a price to be fixed by third persons. We were struck with the suggestion made by counsel during the argument, that the valuation of the improvements made by those selected for that purpose, was not an award in the proper sense of the term; and upon an examination of the authorities we are of opinion that that view of the subject is sustained. An award is defined to be the determination of matters in controversy by submission to persons indifferently chosen by the persons contending. There was no controversy between the parties in this case, before the execution of the agreement which is regarded as a submission. It was a contract to convey lands at a price to be fixed by third persons. Such a reference had no tendency to the termination of a controversy, though it may have some of the characteristics of an arbitration. An arbitration is said to be a *domestic tribunal*, and the arbitrators are judges of the parties own choosing, and are favored both by the Courts and law making power. The Courts not allowing any thing to be alleged against the record, with a view to invalidate it, and the law making provisions for enforcing it. *Elmendorf vs. Harris*, 5 Wen. 516; *Leids vs. Burrows*, 12 E. 1. We do not wish to be understood as maintaining that the appraisement had none of the properties of an award; but to convey the idea that it was not an award in that sense that an action could be maintained upon it. *Van Cortland vs. Underhill*, 17 John. Rep. 405; 2 John. Chan. Rep. 339; *Brown vs. Bellows*, 4 Pick. 178. The agreement is similar to those on which it is held that debt will lie to recover money if the quantity is ascertained at the

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time of bringing the action, though it was uncertain when it was made. Ingleden vs. Cripps, 2 L. Ray. 814; Bur. 2231; Walker vs. Witters, Doug. 6.

If the determination of the arbitrators was an award which, of itself, would have sustained an action of debt, an award, although under the hand and seal of the arbitrators, not being a specialty, *nil debet* would have been a good plea. 2 Saun. 62. Nor does the circumstance that the submission was by deed, make it a specialty. *Nil debet* was a good plea to the action as it was brought, but as if it had been properly conceived it would have been ill, there is no cause of complaint in overruling the demurrer as it reached back to the declaration.

The rejection of the agreement as evidence under the common counts, is not error; if the plaintiff could have declared on the appraisement, it not being a specialty, the agreement might have been given in evidence under the common counts, the rule being that *indebitatis assumpsit* will not lie to recover the stipulated price due on a special contract, *under seal*, when the contract has been completely executed. Clendennin vs. Paulsel, 3 Mo. Rep.; Preston vs. Young, 3d Cranch; Bank of Columbia vs. Patterson's adm'r, 7 Cran. 299; 2 Saun. 350, n. 2. As the party should have declared on his instrument which was sealed, he could not have given it in evidence under the common counts.

We are of the opinion that the demurrer to the first and third counts was properly sustained by the Court below. The objection taken to them, was that they did not show a sufficient excuse on the part of the plaintiff for the non-performance of his part of the agreement. It was not sufficient barely to allege an offer by the plaintiff; a refusal by the defendant should also have been shown, or some act by him amounting to a discharge of the plaintiff. The rule is thus stated by Chitty: "where the respective acts to be done by the plaintiff and defendant are mutual, and are to be performed at the same time, the plaintiff should aver his readiness to perform his part, and either state that the defendant neglected to attend when necessary, or refused to perform his part, or discharged the plaintiff from his performance." The principle of the case of Peeters vs. Opie, 2 Saun. 350, is that it is not sufficient to allege a readiness or offer to perform on the part of the plaintiff, but also a refusal by the defendant, though it was held the *omission* would be cured by verdict. The authorities amply sustain this doctrine. Lancashire vs. Killingsworth, 1 Lord Ray. 687; Lea vs. Exelby, Cro. Eliz. 888; Jones vs. Barkley, Doug. 684; 2 Saun. 352, n. 3.

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*State vs. Bates.—Donohoe vs. Rooker.*

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Judge NAPTON concurring, the judgment of the Court below will be affirmed.

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STATE OF MISSOURI vs. BATES.

Under the act of 1845, for the punishing of gaming, it is indictable to bet money or property on any gambling device.

ERROR to Texas Circuit Court.

STRINGFELLOW, *for the State.*

SCOTT, J., *delivered the opinion of the Court.*

This was an indictment against Bates founded upon the 16th sec. of 8th art. of the act concerning crimes and punishments. Rev. Code, 1845, p. 202. The indictment was quashed by the Circuit Court, and the cause brought to this Court.

The allegation in the indictment is, "that the said James A. Bates, on, &c., at, &c., a large sum of money, to-wit: the sum of five dollars, at, and upon a certain gambling device called cards, then and there unlawfully did bet," &c. Under the act of 1845, it is made indictable to bet money upon any gambling device. In this it differs from the act of 1835, which made it unlawful only to bet upon "a gambling device adapted, devised and designed for the purpose of playing a game of chance for money or property."

• This indictment being in the words of the statute, is sufficient.

Judgment reversed and cause remanded, Judge McBRIDE concurring.

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DONOHOE vs. ROOKER.

The case of Reeds vs. Morton, 9 Mo. Rep. 878, affirmed.

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*McWaters & Salmon vs. State of Missouri.*

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## ERROR to the Chariton Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of trespass *quare clausum fregit* brought by Donahoe vs. Rooker for injuries to a tract of land in Chariton. Pleas not guilty, and the statute of limitations. On the trial, the plaintiff, after proving the trespass complained of, in order to show title in himself, offered to read in evidence to the jury, a deed from H. Shurlds, Auditor of Public Accounts, to himself, for the land on which the trespass was committed. By this deed, it appeared that the land was sold in June, 1832, for the taxes of the year 1831. The deed was dated 19th July, 1834. It was rejected by the Court, and thereupon the plaintiff took a non suit, and has brought the cause to this Court.

The point in this cause was determined by this Court, in the case of Reeds vs. Morton, 9 Mo. Rep. 878. In that case, it was held, that there was no error in rejecting the Auditor's deed for land sold for the non-payment of taxes, where it did not appear that the certificate of sale required by the act of March 1st, 1825, to be given by the Auditor to the purchaser, had been seasonably recorded. The reasons of that opinion are there given. This case is exactly parallel.

The other Judges concurring, the judgment of the Court below will be affirmed.

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HUGH McWATERS & JOHN SALMON vs. THE STATE OF MISSOURI.

1. A prosecutor is necessary on all indictments for a riot, charging a trespass against the person or property of another.
2. It is not necessary to charge that the defendants assembled "unlawfully," or "unlawfully" did the act set out in the indictment. It is only necessary to shew an "unlawful act" done.
3. An objection to an indictment may be raised in the Supreme Court, although not made in the Circuit Court.

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*McWaters & Salmon vs. State of Missouri.*

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## APPEAL from St. Charles Circuit Court.

*CAMPBELL, for Appellants, relies on the following*

## POINTS :

1st. No prosecutor is endorsed on the indictment.

2nd. In an indictment for riot, under the 6th section of the 7th article of the act respecting crimes and punishments, it is necessary to charge in the indictment that the acts *done* or *intended* were *done* or *intended* unlawfully.*STRINGFELLOW, for the State.**McBRIDE, J., delivered the opinion of the Court.*

The defendants were indicted with one John Dyer in the St. Charles Circuit Court for a riot—and on trial were found guilty on the third count in the indictment, and not guilty on the remaining counts. They moved in arrest, and for a new trial, assigning all the usual reasons, and, on their motion being overruled by the Circuit Court, they appealed to this Court.

The third count of the indictment reads as follows :—" And the jurors aforesaid, upon their oath aforesaid, further present, that the said John Dyer, Hugh McWaters and John Salmon, on the day and year aforesaid, and in the said County of St. Charles, did assemble together with the intent to bruise, beat, wound and ill-treat, forcibly and violently, one Alexander Balridge, and in pursuance of such purpose, they, the said Dyer, McWaters and Salmon, did forcibly and violently beat, bruise, wound and ill-treat the said Alexander Balridge, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

This indictment is drawn upon the 6th section of of the 7th article of an act entitled "An act concerning crimes and punishments," Rev. Code, 202, which provides, that if three or more persons shall assemble together, with the intent, or being assembled, shall agree mutually to assist one another to do an unlawful act, with force and violence, against the person or property of another, or against the peace, or to the terror of the people, and shall accomplish the purpose intended, or do any unlawful act in furtherance of such purpose in a violent or turbulent manner, every person," &c.

It has heretofore been decided by this Court, and so we understand



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*McWaters & Salmon vs. State of Missouri.*

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the law to be, that an indictment framed upon a statute, must state all the circumstances which constitute the definition of the offence, in the act, so as to bring the defendant precisely within it, and must with certainty and precision charge him with having committed or omitted the acts constituting the offence, under the circumstances, and with the intent mentioned in the statute. 9 Mo. Rep. 287.

Under the foregoing rule, it is contended by the counsel for the defendants, that the indictment is defective, because it does not charge that the defendants assembled to do any *unlawful act*, or that they did any *unlawful act*; nor does the indictment charge, that the beating, &c., was *unlawful*.

The question then arises, is the word *unlawful*, as used in the statute, a part of the definition of the offence therein specified? This question was presented to this Court in the case of the State vs. Bray, (1 Mo. Rep. 180,) who was indicted for an assault and battery, and the indictment omitted the word *unlawfully*. The defendant moved in arrest, and his motion being sustained, the State brought the case to this Court by writ of error. The statute under which the defendant was indicted, provided, "that if any person shall *unlawfully* assault or threaten another, or shall strike or wound another," &c. And the Court held that it was not necessary that the word *unlawfully* should be used. They say, "the authority referred to (2 Haw. P. 347,) is express that the word *unlawfully* is not used in any one of *Coke's* or *Bastel's* precedents of indictments, nor could the author find any clear or express authority that it is, in any case, necessary in an indictment at common law; but he found it expressly adjudged, that it is not necessary in an indictment for a riot, because the act itself, contained in the indictment, so plainly appears to be *unlawful*," &c.

But it is obvious, from a careful perusal of the statute, that the word *unlawful*, as there used, never was intended to enter into the definition of the offence. If the statute declared the offence to consist in unlawfully beating, bruising, &c., then the word would enter into the definition of the offence, and become necessary in the indictment. But it is not so used—the operative words in the statute, are, *with force and violence*, and an act, however unlawful, which is not accompanied *with force and violence*, does not come within the prohibition of the statute.

It is assigned for error, that the name of a prosecutor was not endorsed on the indictment. If this omission had been brought to the attention of the Court below, much delay and costs might have been saved; and in noticing it now, for the first time, we are governed only by the practice

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*Woods, Christy & Co. vs. Quarles & Thompson.*

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which has heretofore prevailed in similar cases in this Court. In the case of *State vs. McCourtney* and others, it was held necessary for the name of a prosecutor to be endorsed on an indictment for a riot, before the bill is returned—otherwise, the indictment is bad. Under that decision, the judgment of the Circuit Court is reversed.

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WOODS, CHRISTY & CO. vs. QUARLES & THOMPSON.

Evidence showing that witness had paid notes to a firm, in which the individual names of the members of the firm were set out, and of the declarations of the members as to who constituted the firm, made prior to the institution of the suit, is evidence for the firm to prove the partnership.

APPEAL from Cooper Circuit Court.

*HAYDEN, for Appellants, contended:*

1st. That the law does not require the plaintiffs to prove by positive evidence the fact that they composed the members of the firm of Woods, Christy & Co., but that the same may be proved also by circumstantial evidence, and by the admission of the members of the firm, and by general reputation.

2d. That in this case the plaintiffs gave positive and circumstantial evidence, as well as general reputation, of their being the members of the firm of Woods, Christy & Co., and which was ample and sufficient to have entitled them to a verdict in the cause.

3d. That the Court erred in not permitting the plaintiffs to read in evidence to the jury, the two notes given by the witness, Harley, to the firm, and by him paid off, &c., as stated by him in his testimony.

4th. That the Court erred in excluding from the jury, the evidence given them by the plaintiffs, and in instructing them that plaintiffs had given no evidence that they were the members of the firm of Woods, Christy & Co.

*STUART & MILLER, for Appellees, contended:*

1st. The plaintiffs did not prove that notice of protest and non-payment was given in proper time and manner to the drawees, the defendants, and without proving this, they could show no right of recovery against Quarles & Thompson.

2d. The evidence was not sufficient to establish the plaintiffs' co-partnership, under the firm and style of Woods, Christy & Co.

As to the form of notice, and manner of giving the same, see *Story on Bills*, p. 337-8, and *Chitton on Bills*, 8th ed. 364-5, and notes.

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*Woods, Christy & Co. vs. Quarles & Thompson.*

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McBRIDE, J., *delivered the opinion of the Court.*

Malone & Smith made their negotiable promissory note to Quarles & Thompson, for \$238 50-100, dated 6th December, 1842, payable at the bank of the State of Missouri, sixty days after date. Quarles & Thompson assigned the said note to Henry E. Moore, who assigned it to Isaac N. Bernard, who assigned it to Jarrett and Ferguson, who assigned it to Woods, Christy & Co., who assigned it to the bank. On the 7th February, 1843, the note was protested for non-payment, when the plaintiffs, becoming liable to the bank as endorsers of said note, paid the same with the costs of protest, and have brought this action to recover the amount paid by them from defendants, as prior endorsers thereof. On the trial in the Circuit Court the plaintiffs took a non-suit, with leave to move to set the same aside, and filed a motion for a new trial, for the following reasons:

1st. Because the Court excluded from the jury the evidence of the plaintiffs, as insufficient to maintain their said action against the said defendants.

2d. Because the Court sustained the motion of said defendants, to find a verdict as in the case of a non-suit.

3d. Because the Court misdirected the jury as to the law of the cause, upon the motion of said defendants.

Which being overruled, the plaintiffs excepted, and appealed to this Court.

The only question raised in the Court below, and upon the decision of which, by that Court, the plaintiffs were driven to take a non-suit, was as to the sufficiency of the evidence to prove the partnership of Woods, Christy & Co., the plaintiffs. We shall, therefore, confine our investigation to that point alone.

The evidence excluded by the Court, was that given by Gillespie and Harley, for the plaintiffs, and is of the following purport:

Gillespie testified that he had resided in St. Louis for the last twelve or fifteen years; was acquainted with the mercantile house in that city of Woods, Christy & Co., and that the sign over their door was so marked, and they continued to do business in that name until after the commencement of this action; he is personally acquainted with Wm. T. Christy, who resides in St. Louis, and the other Mr. Christy, who lives in Philadelphia, but whose christian name he does not know; he has seen Mr. Woods, who resides in Tennessee or Kentucky, but does not know his christian name. He has understood from common rumor, that the

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members of the firm are William T. Christy, James C. Christy, and James Woods.

Harley testified that he was well acquainted with a mercantile house in St. Louis, and had been acquainted with it since 1840, and prior thereto, which house did business under the sign, firm, name and style of Woods, Christy & Co.; that William T. Christy, whom he knew by his proper name, lived in St. Louis; James C. Christy, whom he knew by his proper name, resided in Philadelphia; and that he personally knew Mr. Woods, who lived in Tennessee, but he could not state from his knowledge of his person that his christian name was James; that he had always understood from William T. Christy, that the firm of Woods, Christy & Co., aforesaid, was composed of the said Wm. T. Christy and James C. Christy, (whose names he knew as aforesaid,) and of the said Woods, whose name he understood was James, though he could not state that he knew personally that his christian name was James; he did not know of any change in the members of the firm until since the 28th April, 1843, but he had heard that since that time another member or partner had been taken into the firm. He further testified that on the 1st November, 1842, he purchased goods at the house of Woods, Christy & Co., aforesaid in St. Louis, to the amount of \$523 76, and executed to them his promissory note for the payment thereof in the following words:

"ST. LOUIS, Mo., Nov. 1st, 1842. Four months after date I promise to pay to the order of Woods, Christy & Co., (merchants and partners in trade, a firm composed of James Woods, William T. Christy, and James C. Christy,) five hundred and twenty-three dollars, and seventy-six cents, with interest at the rate of ten per cent. per annum, after maturity, until paid, for value received; negotiable and payable without defalcation or discount.

WILLIAM HARLEY."

That after the money in the note specified became due, he paid the same at the house, still doing business under the name and style aforesaid, to William T. Christy, who delivered to him the said note.

He further testified that on the 28th April, 1843, he again purchased of the house of Woods, Christy & Co., in said city of St. Louis, (who were still doing business as merchants at the same place, under the name, firm, style and sign of Woods, Christy & Co.,) another lot of goods, wares, and merchandize, upon credit, to the amount of \$303 35, and made his promissory note for the same to said Woods, Christy & Co., of the following purport:—(*This note is similar to the one above set forth.*)

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That after its maturity he paid the same to William T. Christy, at the same house, still doing business under the name and style aforesaid, and upon such payment, the said William T. Christy, delivered up to him his note.

The foregoing is all the evidence adduced by the plaintiffs to prove the partnership, except the evidence of A. P. Kelso, who testified that he was clerk in the house of Woods, Christy & Co., of St. Louis, and that the endorsement on the back of the note was in the handwriting of Wm. T. Christy; "that said William T. Christy is one of the firm of Woods, Christy & Co., of St. Louis, and that the other members of the firm are James Woods, and James C. Christy."

We are aware of the distinction which has sprung up in the country, in establishing by evidence, a partnership, where partners are plaintiffs, and where they are defendants. This distinction was adverted to by this Court in the case of Lockridge, et al. vs. Wilson, 7 Mo. R. 560. It was there held that partnerships may be proven in either of two ways, that is, by articles of agreement entered into by the partners, or by parol evidence. The first is clearly the written declaration of the parties themselves; and if a knowledge of the fact can be proved by parol, the witness could only have obtained certain information of such partnership either by the oral declarations of the partners, or by having seen their written agreement or articles of partnership. So that at last a partnership can only be established by the declarations of the partners, either written or oral; but then those declarations should have been made at a time, sufficiently anterior, or under circumstances which would divest them of the imputation or suspicion of having been made to be used as evidence in the cause pending.

But without infringing upon any rule established elsewhere, and apparently sanctioned by this Court, we are of the opinion that the evidence of Gillespie and Harley, excluded by the Circuit Court, should have been permitted to go to the jury.

Whenever the evidence conduces to establish a fact in issue, the Court usurps the province of the jury by undertaking to decide upon its weight: That such was the tendency of the evidence excluded, cannot be questioned—and when taken in corroboration with the evidence of Kelso, raised a presumption in favor of the plaintiffs which should have entitled it to the serious consideration of the jury.

The other Judges concurring herein, the judgment of the Circuit Court is reversed, and the cause remanded.



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*Wright and others vs. Cornelius.*  
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PETER WRIGHT AND OTHERS vs. WILLIAM CORNELIUS.

1. A bill is filed by A. claiming to have purchased all the right of B. to a certain tract of land, sold under an execution in favor of A. and against B., and alleging that the land was entered in the name of C., with the money of B. Held, that B. is not a proper party to the bill: and that his declarations are not evidence against those claiming under C.
2. A mere allegation in a bill that B., with others, fraudulently conspired against A., does not authorize B. to be made a party to the bill, nor his declarations to be used as evidence against the others.

APPEAL from Boone Circuit Court, (In Chancery.)

HAYDEN & ROBARDS, *for Appellant.*

The appellant will rely upon the following points to reverse the judgment of the Circuit Court:

- 1st. That the Court permitted the complainant to give to the Court, incompetent and irrelevant testimony.
- 2nd. The Court rendered the decree in the cause against law and evidence.

TODD & GORDON, *for Appellee.*

The complainant insists for the affirmance of the decree, upon the following points:

1. That the complainant had a right to give in evidence the oral and written statements of James M. Wright—for the purpose, 1st. Of disproving the facts as to him contained in his answer. 2nd. To prove fraud in him in the transaction as charged in the bill.
2. That circumstantial evidence is the best usually to be had to establish *fraud*, which seeks to cover the motives and acts,—the following facts are calculated to make it evident as existing in this case, and as tolerated by the intestate, and to bind his heirs. George M. Wright knew James had money—and gave advice to have this land entered with it, in some friend's name, to save it from creditors. It was entered in his name with James's agency—the fact of entry was subsequently known to George—he said he would enter it. Fletcher Wright was referred by George to James to purchase a part of the land—the residence and occupation of the land by James—the conversation between George and Kelly Wright, deposed to by J. K. Wright—and the fact of James borrowing George's money, giving note, disclosed, and corroborated by Elijah Wright—no evidence even since George's death of the existence of such note—no disavowal of James's ownership in George's life-time—no act of ownership by George—and all the facts corroborate the first written statement of James and his acts, to shew fraud.
3. The facts charged in the bill are not alleged to be within the knowledge of any of the defendants except James M. Wright—the evidence of one witness, or facts and circumstances equivalent to the evidence of one witness, is sufficient to sustain the decree against the answers of the defendants. 4 Bibb R. 357. 2 J. J. Marsh. R. 139. 3 Mon. 187.
4. The statements of James M. Wright were admissible—he was a necessary party. He is charged as a fraudulent conspirator, and so may be required to discover it: again, he denies title passing to Cornelius by Sheriff's sale, alleging the property to be that of George—the complainant had a right to discovery of the facts relative to the title.

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McBRIDE, J., *delivered the opinion of the Court.*

The appellee, Cornelius, in November, 1842, instituted a suit on the Chancery side of the Boone Circuit Court, against the appellants, who are the heirs and legal representatives of George M. Wright, deceased, who died intestate, in the month of September, 1840, without descendants.

The bill charges that James M. Wright, a brother of the deceased, in the month of November, 1838 or 1839, purchased with his *own money*, at the Land Office at Fayette, Mo., one hundred and fifty-one and fifty hundredths of acres of land, being part of the north-east quarter of Section No. 22, of Township No. 46, in Range No. 13, west, situate in Boone County: that at the time, the said James was involved in debt, and in order to shield and protect the land from the payment of his liabilities, and to secure a home for himself and family, he resorted to the expedient of taking the certificate of entry, in the name of his brother George, then living, and that George died possessed thereof. That Peter Wright, another brother, has administered on the estate of the deceased.

That James M. Wright being indebted to Cornelius, confessed a judgment at law in his favor, for about \$2200, in November, 1840—that execution issued thereon, which was levied upon the land above described, and the same having been sold by the Sheriff, was purchased by said Cornelius, who, on the 6th of May, 1841, obtained a deed therefor.

The bill further charges, that George, the deceased, in his life-time permitted James and his family, soon after the entry of the land, to take possession and to occupy and enjoy the same, from that period down to the present time; that said heirs and legal representatives to whom the title at law descended, upon the death of said George, well knew that the said land was entered with the money of the said James, and *not* with the money of the said decedant, and that the title in equity was in said James, and the land subject to the payment of his debts, yet, they refuse to surrender the title to the complainant, who by virtue of his purchase at Sheriff's sale, has succeeded to the rights of said James. The bill prays that the defendants may be compelled to convey and surrender up to the complainant, all their interest in said land, and for general relief.

James M. Wright, in his answer admits that the complainant obtained judgment against him as charged in the bill, but states that he has no

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knowledge of the suing out of execution, or the levy thereof on the land in controversy, nor the sale, purchase and deed of and to the said land—that when said judgment was rendered, he did not own, claim, or pretend to claim, any portion of said land, otherwise than as tenant under his brother George, and since his brother's death, only as one of his heirs and legal representatives, of one-twelfth part thereof. That in the latter part of the year 1838, George entered the land, at the Fayette land office, in his own name, with his own money, and for his own benefit, and took the receiver's certificate therefor; that he did not furnish any money whatever to George, for the purpose of entering the land, nor did he by any persuasion, means or contrivance, procure George to enter the same for respondent's use or benefit—that neither directly nor indirectly did he give or furnish, or procure to be given or furnished, any money, property or means whatever, to enable, or induce his brother, to enter the land, nor has he since the entry, and before the death of said George, given or paid him any consideration for said entry or land, nor was there ever, at any time, any contract or contrivance whatsoever between them in reference thereto, by which the land was to be exempted from the payment of his debts, or any creditor delayed, hindered, or defrauded thereby.

He further answers and states that in 1837 or 1838, owing to misfortune in trade, he became embarrassed, and gave up every species of property, in liquidation of his debts, and that when George M. Wright entered the land in controversy, this respondent was destitute of a home, and out of employment, and proffered to let him take possession and improve the same, which he did until the death of George, without any specific contract as to his compensation. That George did a few weeks before his death, tell him that he intended to give the land to respondent's children, but that his intentions were never carried into effect.

The answer further states, that on divers occasions the respondent claimed the land as his own, alleging that he had an equitable title to the same, that he did so, not because he, in fact, had any such title, but because he supposed it would or might influence his brothers and sisters to convey and relinquish their title to said land, to him, thereby carrying out what he verily believes was the intention of his brother, to give the land to the children. That he was further induced to set up a claim to the land, hoping that the complainant would endeavor to subject it to the payment of his judgment against this respondent, when he could set up as a defence or bar to the complainant's right thereto, the fraud perpetrated by said complainant on this respondent, in obtaining the bonds

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upon which the judgment at law was had, and which he was ignorant of at the time of the judgment. But that he is now advised that his defence cannot be made in this cause.

Peter Wright, and most of the other defendants, answered the bill, denying all knowledge of the material allegations contained therein, and requiring proof thereof. Other of the defendants failing to answer, the bill was taken as confessed against them.

Replications having been filed to the answers, the cause was set for hearing at the August Term, 1845, of the Circuit Court of Boone County, when the Court rendered a decree for the complainant, according to the prayer of his bill. Thereupon the defendants filed their motion for a re-hearing of the cause, assigning the following reasons:— 1st. Because the Court permitted the plaintiff to give in evidence, incompetent and irrelevant testimony, upon the hearing of the cause. 2nd. Because the Court permitted the complainant upon the hearing of the cause, to give in evidence, the declarations of James M. Wright, with reference to the entering and purchasing of the land in controversy, and the declaration of said James that the land was purchased at the land office, with the money of said James. 3rd. Because said declarations were made (and received as evidence by the Court upon the hearing,) in the absence of the said George M. Wright, and also in the absence of the defendants in this cause, who are heirs of said George, deceased. 4th. Because the finding of the facts of the cause, as well as the decree of the Court, are against the law and the evidence given in the cause. 5th. Because the same is against equity and good conscience. Which being overruled, the defendants appealed to this Court.

The bill of exceptions shows that upon the hearing of the cause, in the Court below, the complainant gave in evidence the proceedings in the cause at law, between himself and James M. Wright, the judgment and execution thereon, and the Sheriff's deed to said complainant for the land in controversy. He further offered in evidence a letter from James M. Wright to James Gordon, which was objected to by the defendants, but their objection having been overruled, and the hand writing proved, the same was read, as follows:—

*“Missouri, Boone County.*

“I left with Hampton L. Boon, 150 dollars, if I mistake not, of my money to enter the land I now live on—told him it was George M. Wright's money, and to have the land entered in his name. I returned home from the Land Office without having the land entered, as this was not enough money to enter the land. I went to my mother, who had the

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care of George M. Wright's money—told her to let me have \$48 of his money, for I had not enough of my own to enter the land,—she gave it to me, and I left my due bill in the mouth of his purse (or money bag,) for the same. I gave the \$48 to Elijah Wright's son William, and an order in the name of George M. Wright for the \$150 I left with H. L. Boon, and pulled corn in his place, at his father's, while he went and entered the land. I told him the money was George's;—Elijah Wright saw me give William (his son,) the money and order. Elijah smiled and said he expected I would do better than William, (my brother,) who had gone to Spring river, fully understanding the money was mine, but did not ask if it were—but would not let his son go, until I would pull corn in his place, and also charged his son to tell no person his business on the way. William drew the money from Boon, and had the land entered in the name of G. M. Wright, but made a mistake in the duplicate. I wrote to Boon about it, and signed my name agent for G. M. Wright—he wrote to me it had been entered on the books, in the name of G. M. W. (see the letter at Wm. Cornelius's.) During this time, George was in the woods surveying, and knew nothing of the transaction. When he came home, I told him what I had done, that I had entered the land in his name, and told him I was a going to enter it in the name of brother Peter, who had told me I might do so, but that if James K. Wright should ever want the land, I must take pay for my improvements and let him have it;—this appeared to excite George, and he said let it stand just as it is, and I will keep it for you, I care nothing about the \$48, I will give you that, and accordingly I have never seen the due bill. I named to brother Peter, he was in a narrow place with his son-in-law, J. K. Wright, who at that time wanted the land, and that it had been entered in another name. I thought he was not pleased about it, (for I did not tell him I would not enter it in his name,) and he replied, 'hush! say as little as possible about that matter.' I wanted George to let Cornelius have the land, and to pass a deed to him for the same; he said he would if Cornelius would release me from debt—he told me he would do that—so George said he would pass the deed—we conversed with Cornelius about it, he came and seen the land, and told George and myself he would do it, if Peter Wright would relinquish his interest in the 45 acre tract, which I lived on near my father's, and which interest he had purchased of father—he would not do this, so the trade spoiled. I wanted George then to convey all the interest he had in the land to my children, as I now had lost all hopes of paying my debts with it—he said he would do it, but put it off—once told me he was afraid of



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criminating himself to pass any title—he told Peter Wright's family he intended my children to have the land, (subpœna Peter and William E. Wright.) George told Fletcher Wright he should have the land on the hill next to him, and this was understood when Cornelius came to see it, that if he got the land, he should let Fletcher have that portion. I have no doubt but George told Peter all about it—he told Fletcher how it was, and that he would not claim it—he always retained the duplicate—told Fletcher I had entered the land with his money, and that I had as well thrown it in the fire. John E. Teeters heard George and Fletcher have a conversation on this subject—(subpœna him)—he will not say what George said *except* that he said I must have a home. George told James K. Wright what disposition he wanted made with his property while on his death-bed—said he wanted my children to enjoy his property, and that he did not want Cornelius to enjoy it. I have no doubt but he told Kelly the condition of the land—he told no person in the world how he wanted his property divided but Kelly, (subpœna him,) Elijah Wright, William Wright, (his son,) Peter Wright, William E. Wright, (his son,) Fletcher Wright, John E. Teeters, H. L. Boon; if you want my mother's evidence, you must get that at her house, she is too frail to go to Court. I give you these particulars so you may judge the better of the case. The land is mine—my money entered it, and the world cannot prove to the contrary. When I thought of entering the land in Peter's name, I sealed up the \$150 in paper, my wife gave it to Myra J. Wright, J. K. Wright's wife, she gave it to her father, P. W., and the next morning I called for the money, Peter gave it to me without breaking the seal, told me to enter him as much land as that would buy. If you desire any other particulars, communicate to me by mail, and I will give you all I know.

“Yours, very respectfully,

“JAMES M. WRIGHT.

“*James Gordon.*”

James M. Gordon, testified, that about the — day of — 1840, James M. Wright and William Cornelius came to his office together, in the town of Columbia, and that at that time, James M. Wright told him the same facts in substance of the letter of James M. Wright above recited. That afterwards, James M. Wright, when he came to confess a judgment in favor of William Cornelius, in the Boone Circuit Court, told him the same facts substantially—that after this, James M. Wright went home and wrote him this letter, which he a few days after received—that Jas.

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M. Wright frequently talked the matter over with him afterwards, and told him in substance, the facts set forth in his letter above recited.

John E. Teeter, testified, that he heard a conversation between George M. Wright and Fletcher Wright, his brother, at the house of the latter, a short time before James moved upon the land in controversy, in which conversation Fletcher said, why don't James come down here into the rich land, and take a lease upon some land? George replied it was an up-hill business for one hand to get along in this bottom by himself. When this was said they were talking about James's distresses—George said James had money enough to enter him a piece of land, and that it was not worth while for him to enter it in his own name, for his creditors will take it from him—some of us ought to take his money and enter him a home. Fletcher said he would smuggle property for no man, and that when he died he wanted his mind free of every thing, and that all he had should be his own. George then turned to witness and asked him how the lines run of the land adjoining Fletcher's, and afterwards entered. Witness said he agreed to go next morning and show them—that next morning, George, Fletcher and witness, went upon the land, and while there, they examined for a spring, which was supposed to be upon the land, but upon examination they found it not to be upon the land. That while upon the land, George said, I will enter the land, I think James can support a small family on it—that as they were going home, Fletcher remarked that one line of this tract run near his house, and if George did enter it, he wanted him to sell him a small strip of it. George said, if I enter it, you and James for that, for I have nothing to do with it—that he heard Fletcher Wright say, talking upon the subject of the entry of the land by George M. Wright for James M. to live on, that they might all smuggle as much as they pleased, he wanted to live clear—that James M. Wright moved upon the land some time after this conversation—that after James moved upon the land, witness met George in Columbia, and George asked him how James was doing, was he at work? Witness told him James was doing well—George asked him then if James had sold Fletcher a piece of the land, witness answered him that he did not know. Witness lived at James M. Wright's some time after he moved on the land, and he frequently heard him talk about the land, and James told him, witness, that the land was entered with his (James's) money, with the exception of \$48, and that sum he had gotten from George, and that George had said he did not want it, if his (James's) children could get it. George never told witness that he had any money in his possession

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belonging to James ; but that James, after he moved upon the place, (the time he does not recollect,) told witness that George had some of his money, the proceeds of a sale of peltry and furs, brought by James from Santa Fe—that he had about \$1000 worth, that he heard his creditors were dissatisfied about not getting it, and he shipped it off and sold it, and that a portion of this money was in George's hands, and part of it had paid for the land.

Cross examined—Witness stated that James M. Wright, two years ago, made out an account against the estate of George M. Wright, and presented the same for allowance, before the Boone County Court, for the improvements made upon the place, and that he was used as a witness by James M. Wright to prove the account, and that upon that occasion, he stated that George told him that he would enter the land, and that George told him he had entered the land, and that afterwards James went upon the land and made the improvement, for which he then claimed pay, and that he further stated at that time, he did not know who owned the land ; but would then have stated what he now states if he had not been stopped by counsel—and further stated that James never told him positively, that the land was entered with his money, and also that James and George had never together had any conversation in the presence of the witness.

Milton S. Matthews, testified, that he was present at a trial of James M. Wright, before the church at Mount Moriah, when he stated the facts about the entry of this land, by George M. Wright, in the manner substantially as is stated in the letter of said Wright, which he has heard read to the jury—that \$150 of the money which went to pay for the land, was his (James's) money, and that \$48 was taken by him out of the purse of George, which was in their mother's possession, and that he placed his note for the money in the purse when he took it—he also said he had received the money for the furs, and that when he had formerly stated on trial, in the church, he had never received that money, he had lied—and he stated that he had retained a part of that money and entered the land with it, and if George had have lived, there would have been no difficulty about the land.

James K. Wright, testified, that at the time the entry was made, he was not in the State, and knew nothing of it—that in August, 1840, which was shortly before George died, he had a conversation with George M. Wright—that he had formed a partnership with George for the purpose of selling goods, and that in the conversation George asked witness if he knew the particulars about his entry of the land.

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referring to the land James lived on, witness told him he presumed he did—George told him that the letter W. had been placed in his name, in the certificate of entry, instead of M.—that James had attended to it in his absence, and that he feared there was some design in it—that William M. Wright, his nephew, had gone up and entered it, and knew his name as well as he knew it himself, and asked witness's opinion about it,—witness told George he did not think that would prejudice his right in the least—George then said he would never make James a deed until he got his money back—said that George intimated in the conversation that James had put the W. in the certificate of the receiver to defeat George's title—stated also that witness and George had had it in contemplation to purchase this tract some time before the entry was made, provided they could get a piece adjoining it, but that they did not get the piece they wished, and abandoned the idea of buying this—that when George said he never would make James a deed until he got his money back, remarked he might give it to James's children—that James M. Wright moved upon the land spoken of, as entered in George's name, a short time after the entry was made, and has lived on it with his family ever since, up to this time.

Elijah Wright, testified, that in the fall of 1838, while he was pulling corn, James came to him and said he wished a favor of him, that George was about to enter a piece of land, and had deposited a part of the money in the office at Fayette, Mo., for that purpose, and had gone into the woods to survey public lands; that he (James) had understood that the piece was a fractional quarter, and that part could not be entered; that he had been to see his mother, who had George's key, and that she had consented to let him have the balance of the money to enter the whole piece for George—that there was a cabin on the land, and that he was somewhat interested in getting the land, because George had told him he might go upon the land and live—that his family was sick, and he could not go to Fayette and attend to making the entry, and asked the favor of witness to let his son William go and enter it. Witness told James if he would pull corn while William was gone, he might go; to this he consented, and William went to Fayette. Witness resisted the claim of James in the County Court against George's estate, because he thought it exorbitant and unjust, and thought that the use of the land had been sufficient compensation for his improvement. After he consented that his son might go to Fayette to enter the land, James went over to the old lady Wright's place—came back with money, gave it to his son William, and he went—his son Wil-

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liam is now dead. At this time, George was absent from home,—had been absent for two or three weeks on a surveying tour.

Cross examined:—About two years after George's death, James brought him a deed to sign; the deed purported to convey the land from the heirs of George to James; this, witness refused to do; James then asked witness if he would convey the land to his (James') children; this he refused to do; James then told him that the heirs of George should never have any benefit of the land, for the land was entered with his money, except \$40; this was the first time witness ever knew that James set up any claim to the land; witness does not know of George having any lands in the vicinity of the land spoken of, and never heard George say any thing about what he had done for James; that afterwards, in Columbia, James told witness that the land was entered with his money, except \$48, and that the heirs had better convey the land to him or his children, for neither the heirs, nor Moses U. Payne, should ever have any benefit from it; that he had given it to George, and that George had never re-conveyed it to him; stated that George lived two years after the entry, and that when he died, he was one of the administrators, and never found in his papers any note on James M. Wright; he does not know of George's ever having in his hands any money belonging to James, nor did he ever hear George speak a word about entering the land; that George, the summer previous to the entry, was county surveyor, (deputy,) and had a map of the vacant lands lying on the river, on both sides; never saw any letter or any writing from George or James concerning the entry, to himself or to any other person.

John E. Teeter, recalled, testified, that the conversation spoken of in his examination in chief, occurred about two years previous to the death of George, and does not recollect the season of the year in which it occurred; and that he knew the lines bounding the land, not from any regular survey, but from having been with Nash when he made an irregular survey of land adjoining this.

A. W. Turner, for the defendants, testified that he was present at the trial of James M. Wright, against the estate of George M. Wright, in the Boone county Court, and was counsel against James M. Wright, and that John E. Teeter was the witness to prove James' account; and that Teeter, on that trial, stated that George M. Wright told him, (Teeter,) before he entered the land, that he was going to enter it, and after George M. Wright entered the land, he asked Teeter if James M. Wright was at work on the land, and then said, he, Geo. M. Wright, had entered the land; this was what Teeter stated in substance.



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Two points are made by the appellants in this Court, and relied upon to reverse the decree of the Circuit Court.

1st. That the Court permitted the complainant to give to the Court incompetent and irrelevant testimony.

2d. The Court rendered the decree in the cause against law and evidence.

To sustain the action of the Circuit Court, in permitting the complainant to give in evidence the oral and written statements of James M. Wright, it is insisted that he was a necessary party, and being charged in the bill as a fraudulent conspirator, should be required to discover it.

If the charge in the bill be true, that complainant obtained a judgment against James M. Wright; that execution issued thereon, and that whatever interest James had, in and to the land in controversy, was sold by the sheriff, and purchased by the complainant; then the complainant succeeded to all of James's interest and stands in his place fully invested in law and in equity with all his right and title—we cannot perceive the necessity of making him a party to the bill.

Courts of equity adopt two leading principles for determining the proper parties to a suit. One of them is a principle, admitted in all Courts upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be finally decided in a Court of justice, unless he himself is present, or at least unless he has had a full opportunity to appear and vindicate his rights. The other is, that when a decision is made upon any particular subject matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, shall be provided for, as far as they reasonably may be. It is the constant aim of Courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented. Courts of equity delight to do justice, and not by halves. Hence it is a *general* rule in equity, that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. Story's Equity Pl.; Cooper's Eq. Pl.; Mitford's Eq. Pl.

But it is contended that although James M. Wright may not have such an interest in the subject matter as to make it necessary, under the *general rule*, to make him a party defendant, yet he comes fully within one

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of the exceptions to such rule; for the bill charges him with being a fraudulent conspirator with the other defendants. There is a marked distinction, however, between a charge in a bill of conspiracy and combination, and the proof necessary to sustain such charge. To assume the fact, from the charge in the bill, would entirely dispense with all proof on the subject; whereas, the more equitable rule is, that the charge should be established *aliunde*, and then, and not till then, is the complainant permitted to give in evidence the declarations of one defendant to affect the rights of a co-defendant—as in the case of partners in the same transaction, or where one defendant succeeds to another, so that the right of one devolves on the other, and they become privies in estate.

This course was not pursued by the Court below in the case now under consideration. That Court assuming or taking for granted, from the charges in the bill, that a combination existed, permitted the complainant to introduce as evidence, and against the other defendants, the written and verbal statements of James M. Wright; and made them the foundation for a decree in favor of the complainant in the cause; and that, too, notwithstanding the allegation in the bill, that the complainant had, by virtue of the sheriff's sale and deed, succeeded to and represented all the rights of James M. Wright.

James M. Wright having been divested of all interest in the land in controversy, should not, we think, have been made a party defendant; but having been so made, after the coming in of his answer, wherein he disclaims all interest—if his evidence was material to the rights of the complainant, an order should have been obtained from the Court for permission to use him as a witness. This was not done. If he was a competent witness, it was clearly against the rules of evidence to prove by other testimony his knowledge of the transaction. Such evidence would only be hearsay, and without any necessity known to the law for its introduction.

If the defendants here claimed title under James M. Wright, either directly or otherwise, then it might be proper to introduce the declarations of James, made prior to or at the time when he parted with his title; but they do not so claim; their title is under George, their deceased brother, and adverse to that of James.

If the principle be established that an individual, in failing circumstances, and between whom and others having property, no privity exists, can create by his own declarations an estate to satisfy the demands of his creditors, then there will be no safety in our titles.

But it is said by the complainant's solicitors, "that the facts charged in

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the bill, are not alleged to be within the knowledge of any of the defendants except James M. Wright, and the evidence of one witness, or facts and circumstances equivalent to the evidence of one witness, is sufficient to sustain the decree against the answers of the defendants," and for this principle we are referred to 4 Bibb R. 357, 2 J. J. Mars. R. 139, and 3 Mon. R. 187. But those authorities do not sustain such a principle; they only assert what is rational, that is, "that one witness without any corroborating circumstances, is sufficient to sustain a bill of injunction against an answer, in which the defendants profess that they know nothing about the subject, or where the facts may not be within the defendant's knowledge." The true rule, we apprehend, is that the answer of a defendant, when responsive to the bill, must be taken to be true, unless it is contradicted by the positive testimony of two witnesses, or the testimony of one witness with strong corroborating circumstances. 2 John. Ch. Rep. 92; 6 Wheat. 468; 1st Bibb 235. And this is the rule of reason as well as of equity, for the answer being under oath, it is equivalent to the evidence of one witness, which would only be set off by the positive evidence of a witness in the cause, contradicting the answer, and then to outweigh and disprove the answer, it would require the evidence of another witness or strong corroborating circumstances.

Very different is the case now before us, where the facts charged are not only supposed to be within the knowledge of James M. Wright, and so charged in the bill, but are expressly denied by the answer. Suppose, however, that the evidence of one witness is sufficient to discredit the statements of James M. Wright, made in his answer, what avail would it be to the complainant? A decree against the other defendants would not go as a legal consequence, but he would be required to prove the truth of the charges and allegations in his bill.

Again, if it were conceded that the verbal and written declarations of James, under the circumstances, could be received as evidence, to divest the other defendants of title, and invest himself with such an estate as would enable him to pay his debts, the question would arise whether his declarations are entitled to credit.

It is not necessary to canvass them further than to refer to and compare his written and oral statements, as proven by his letter to Mr. Gorden, his declarations made to him, and upon his trial before the church, with those made in his answer under oath, to show his prevarication and inconsistency, and the falsehood of the one or the other.

We cannot consent that the declarations of a man, who has shown such an utter disregard for his own reputation, as also for the rights of his co-

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defendants, shall be made the basis of a decree whereby the rights of any individual are to be affected. At most, his verbal declarations only impeach his answer, whilst his answer fully disproves his verbal and written statements, leaving it uncertain whether the one or the other, or either, be true, and rendering it immaterial to enquire which are most entitled to credence. He has wantonly, and by his own voluntary act, destroyed his own credibility.

Independent of the statements of James M. Wright, which ought not to have entered into the consideration of the Court in making the decree, we will examine and see whether the decree be warranted by the testimony in the cause. The first in the order of time is that of John E. Teeter, who states that he was present when George, the deceased, and Fletcher, one of the brothers, were examining the land in controversy, prior to the entry by George, when George said that James had money enough to enter him a piece of land, but that it was not worth while for him to enter it in his own name, as his creditors would take it from him, and that some of his friends ought to take his money and enter him a home. To this suggestion Fletcher replied that he would smuggle property for no man, and that when he died, he wanted his mind free of every thing, and that all he had should be his own. George then turned to Teeter, and enquired how the lines of the land adjoining Fletcher's, and afterwards entered by him, run. The next morning the parties again went upon the land, and whilst there George said he would enter the land, as he thought James could support a small family upon it. As they were returning home Fletcher remarked that one of the lines run near his house, and if George did enter the land, he wanted him to sell him (Fletcher) a small strip of it; George said if he entered the land, Fletcher and James for that, for I (George) have nothing to do with it. James moved upon the land some time after this conversation, and thereafter Teeter met George in Columbia, when the latter enquired how James was doing, whether he was at work, and if he had sold Fletcher any of the land. After the death of George, James presented an account against the estate, for allowance for improvements made by him on the land, and Teeter was the witness by whom he established the same.

George asked James K. Wright if he knew the particulars about his entry of the land, referring to the land on which James M. Wright lived; George said that the letter W had been put in his name in the certificate of entry, instead of M; that James M. had attended to it in his absence, and that he (George) feared there was some design in it; that his nephew William M. Wright, had gone up and entered it, and knew his name as

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*Wright and others vs. Cornelius.*

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well as he knew it himself, and asked the witness's opinion about it. He told George that he thought it would not prejudice his right in the least; George then said he never would make James a deed, until he got his money back, and intimated that James had had the W put in the certificate of entry to defeat his title; remarking, further, that he might give it to James's children.

It was disclosed by the evidence that James M. Wright was greatly embarrassed and had a family, whilst George M. Wright, deceased, was unmarried, unembarrassed, and had means.

Divesting the case, then, of the suspicion of a fraudulent combination, thrown around it by the reprehensible conduct of James M. Wright, and the improper admission as evidence of his diverse statements, it would appear that George M. Wright, deceased, who was the brother of James, was desirous of rendering him that service or aid which James's embarrassed condition appeared to require, to enable him to support his family. He suggests to another brother, Fletcher, that some one of the family should take James's money, and enter him a piece of land in their name; whereby it would be protected from liability for James's debts, and at the same time afford him a home, and the means of a support for his family. This proposition was disapproved of by Fletcher, and it is but fair to presume that it was abandoned, either from the suggestion made by Fletcher, that it would be smuggling, or because George was mistaken when he stated that James had money enough of his own to enter the land. For the testimony of James K. Wright shows that the land was entered with the money of George, and that George was apprehensive that his brother James, in making the entry for him, had not acted in good faith. George then declares that he never will convey to James until his money is refunded, but that he might perhaps give the land to James's children.

But when Fletcher enquired of George, whether if he, George, entered the land, he would sell him, Fletcher, a strip off of it adjoining him, George replied, that if he entered, Fletcher and James for it, as he, George, would have nothing to do with it, may, I think, be readily explained by reference to the relation existing between the parties, and the fact that as George designed to enter the land for the benefit of James, and ultimately as a gift to his children, he did not desire to interfere himself with it, but would leave the brothers, who were more directly interested, to make such an arrangement as best suited them. Teeter, who heard the conversation, could not have believed that the land was entered with the money of James, for he was the witness by whom James



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established, in the County Court of Boone county, a demand against the estate of George, for the improvements made by him on the land in controversy. If he did believe so, and suffered himself to be used as a witness to establish a false demand against the estate of a dead man, no credence should be given to his testimony.

The decree of the Circuit Court ought to be reversed, and the bill dismissed, and the other Judges concurring, the decree is reversed, and the bill of the complainant dismissed.

SCOTT, J.

Whether James M. Wright was a proper party to the bill or not, his answer was only evidence against himself; he could not have been examined as a witness against the other defendants, for he was interested. 8 Mo. Rep., *King vs. Bailey*, and the [cases there cited. I am in favor of reversing the decree.

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 WHITE vs. TODD & TODD.

A. having mortgaged land to B., conveys the same to C.; after the sale to C., A. conveys the land to B., and B. enters satisfaction of the mortgage. Held, that the legal estate vested in A. by the satisfaction of the mortgage, reverts to and vests in C. the first purchaser;—and that although B. was mortgagee, and in consideration of the deed from A., released to A. his mortgage, B. can get no precedence, but the legal title will be in C

**ERROR to Boone Circuit Court.**

*KIRTLEY, for Plaintiff in Error, contends :*

That the deed of Glasgow and the mortgage of Morris of the 8th March, 1837, are to be taken and considered as one contract, and that the subsequent conveyances are but continuances of the same contract, and that the legal title to the land in controversy, from the evidence given and offered, was continuously in Glasgow, and never out of him until his sale to White,—and for authority: see 18th Pick. Rep. 543. *Lovering vs. Fogg*, 7th Mon. Rep. *Stone vs. Phelps*, 635. 3 J. J. Marsh, 354. *Edrington vs. Harper*, 2 Mars. 596. 3 do. 478, at 1 Pirt. p. 148, §34.

*White vs. Todd & Todd.*

*Todd, for Defendants in Error:*

1. The plaintiff saves no exception to the rejection of any evidence offered by him, and without exception saved, can have no benefit in this Court. 7 Mo. R. 419. 8th *ibid.* 136, 224.

2. But if rightly excepted to, the testimony was legally rejected, for 1st. The mortgage deeds are no evidence of title in ejectment, but against mortgagor, or one holding under him by the deed. 2 Bibb, 129. 5 Litt. 321. 10 J. R. 381. 2 Johns. Rep. 221. 4 Wend. 369. 8 Cow. 543. 7 J. R. 278. 2ndly. Easily, and those under him, hold by deed, and their possession is adverse to Glasgow and Morris. 4 Litt. 474. 2 Mars. 27. And, 3rdly. The mortgage deeds were null and void, and all title under them destroyed by satisfaction. 1 Cow. 268. 9 Wend. 511. 6 J. R. 257. And, 4thly, The parol evidence is inadmissible to explain the consideration or covenants in the absolute deeds of May, 1844, and to have relation to such mortgages; such relation can only exist by foreclosure, and sale under it. 5 J. C. R. 35, 214. 6 do. 393, 417. 2 Bibb, 246. 1 Peters, 1. And, 5thly. The absolute deeds of May and September, 1844, from Morris to Glasgow, are younger than that under which defendants claim, and a younger legal title must fail in ejectment against an elder. 2 Bibb, 129. 5 Litt. 321. 2 Johns. Rep. 225. And, 6thly. No equitable lien or mortgage is available in a suit at law to invalidate an elder legal title and postpone it to a younger. 2 Bibb, 628. 4 Wend. 369. 1 J. C. 114. 12 J. R. 418. 2 J. R. 221. 8 J. R. 487. 3 do. 422. 2 J. C. 321.

4. The instruction was rightly given; for those deeds show an outstanding title effectual at law against Glasgow, and any claiming under him. 1 Mars. 251. 2 Litt. 160. 3 do. 36. 9 Cow. 86.

*McBRIDE, J., delivered the opinion of the Court.*

This was an action of ejectment brought in the Boone Circuit Court to the April Term, 1845, to recover a tract of land—plea, not guilty; issue and trial had at the August Term, 1845, when the jury returned a verdict for the defendants; whereupon, the plaintiff filed his motion for a new trial, for the reasons:—

1st. The Court excluded legal evidence offered by the plaintiff.

2nd. The Court misdirected the jury.

3rd. The Court gave the jury improper and illegal instructions on the motion of the defendants.

4th. The verdict is against the law and the evidence.

Which having been overruled by the Court, the plaintiff excepted, and has brought the case here by writ of error. The bill of exceptions shows that on the trial, the plaintiff to support his action, read in evidence, a patent from the President of the United States to Nathan Glasgow, for the land in controversy. Then a deed from Nathan Glasgow and wife to Mt. Aetna Morris, for the same land, dated the 8th March, 1837. Then a deed from Morris and wife to Glasgow, dated 4th May, 1844, for the same land. Also, another deed from Morris and wife to

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*White vs. Todd & Todd.*

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Glasgow, confirmatory of the previous deed, and intended to convey the wife's dower, dated 23rd September, 1844. These several deeds were read without objection on the part of the defendants.

The plaintiff also offered to read in evidence to the jury, a mortgage made by Morris and wife to Glasgow, dated 8th March, 1837. Also, a mortgage from Morris and wife to Glasgow, dated 15th May, 1838. Thereupon the defendant's counsel read to the Court, the acknowledgement of satisfaction made on the record by Glasgow, on the mortgage of the 8th March, 1837, dated 21st January, 1839, and on the mortgage of the 15th March, 1838, dated 1st January, 1845,—and then moved the Court to exclude said two mortgage deeds from the jury, for the reason that they were satisfied and discharged, and afforded no evidence of any legal title in the plaintiff. To support the deeds the plaintiff offered to prove by the Clerk of the Court that he drew the said deeds of mortgage, and made the said endorsements of satisfaction thereon, and that the true and only consideration of said acknowledgements of satisfaction, on the record of said mortgage deeds, was the deeds from Morris and wife to Glasgow, re-conveying the same land to secure the payment of the purchase money of which said mortgages were given by Morris to Glasgow. To this parol evidence, the defendant's counsel also objected, and the Court sustained the objection, and excluded said evidence from the jury, as likewise the said two deeds of mortgage.

The bill of exceptions does not show that the plaintiff, White, has any title, although it is stated in the brief of the counsel on both sides, that he holds by deed from Glasgow. Here the plaintiff closed his evidence.

The defendants then offered and read in evidence, without objection, a deed from Morris and wife to John Easley, of 5th February, 1839. A deed from Easley to W. W. Bryan, dated 24th May, 1842. A power of attorney from Bryan to N. W. Wilson, with power to sell and convey, dated 15th January, 1843. A deed from Wilson to R. S. Barr, dated 6th April, 1843. A deed from Barr to R. S. Todd, dated 6th November, 1844, in trust for the wife and children of Samuel B. Todd. It was admitted by plaintiff that the several vendees took and held possession of the land in controversy, under their deeds respectively.

This being all of the evidence given by the parties, the defendants moved the Court to instruct the jury as follows:—

“That if the jury believe that the deeds given in evidence by defendants of Glasgow and wife to Morris, of 8th March, 1837, and from Morris and wife to Easley, were executed by the parties respectively, they will find for the defendants.”

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To the giving of which, the plaintiff objected, but his objection being by the Court overruled, and the instruction given, he excepted.

To a more ready understanding of the subject, it will not be amiss to present a condensed statement of the several transfers, in their order as to date :—Glasgow sold and conveyed by deed to Morris on the 8th March, 1837. On the same day Morris mortgaged the premises to Glasgow. On the 15th May, 1838, Morris again mortgaged to Glasgow. On the 21st January, 1839, Glasgow entered satisfaction on the first mortgage. On the 5th February, 1839, Morris conveyed by deed to Easley. On the 4th May, 1844, Morris conveyed by deed to Glasgow. On the 1st January, 1845, Glasgow entered satisfaction on the second mortgage.

It is thus seen, that when Easley purchased and received a conveyance from Morris, that Morris had nothing but an equity to convey, having previously mortgaged the premises to Glasgow, and the mortgage then remaining unsatisfied on the record. How could Easley, under this state of the transaction, have acquired the legal title? Only, I apprehend, by paying off and discharging the mortgage debt. But he does not do so; and before the mortgage is satisfied, Morris conveyed by deed to Glasgow. What title did Glasgow acquire under the deed? If the deed to Easley had been a mortgage, then he would have taken the property subject to the equity of Easley; and if the mortgage to himself had been given to John Doe, then he would unquestionably have taken the estate charged with both equities. But it is said that the legal title is in Glasgow, under the mortgage—that is perhaps true, but then he was afterwards divested of the title thus acquired by his acknowledging satisfaction on the mortgage.

The plaintiff who claims title under Glasgow, does not insist on the title derived under the mortgage deed, but under the absolute conveyance by Morris to Glasgow. This conveyance is subsequent in date to the conveyance of Morris to Easley, under whom the defendants claim title. Both the title of Glasgow and Easley were dependent on the mortgage, and when that was satisfied, the legal title which reverted to Morris, enured to the benefit of Easley the first alienee under Morris. R. C. p. 753, 219.

We do not regard Glasgow as being in any better condition by reason of his being mortgagee, than if a third person sustained that relation, and had entered the satisfaction on the mortgage.

If Glasgow could derive no advantage from his relation of mortgagee, then the evidence of the Clerk, by which it was attempted to link

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*Wells and others vs. Wells.*


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together the two titles in him, and which was rejected by the Court, was wholly immaterial, and it was not error in the Circuit Court to exclude it.

If the view we have taken of the case be correct, it results that the Court did not err in the instruction given, and the other Judges concurring herein, the judgment of the Circuit Court is affirmed.

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WELLS AND OTHERS VS. B. & C. WELLS.

A testator devised property to certain legatees, with a condition that if "either of such legatees should die before coming of age, or marriage, the portion of such legatee should be equally divided among the others."

Held:—

That such limitation only extends to that contingency which may first happen; and where one married, and then died before coming of age, the limitation as to that estate would not apply.

ERROR to St. Charles Circuit Court.

SCOTT, J., *delivered the opinion of the Court.*

This was a proceeding in partition, and the question in the cause arises under the following state of facts: Samuel Wells died possessed of considerable property, real and personal. He had twelve children, six by a former, and six by his last wife. By his will he devised most of his property to his children by the last wife, giving the children by his first wife small legacies, alleging that those legacies made the portions formerly received by them equal to those given the children by the last wife. After devising his property among the six children by the last wife, he directed "that should either of the said six children die before they came of age or married, the property of such deceased child to be equally divided between the survivors." One of these children, a daughter, married under age, and died before she was twenty-one, without leaving any children or their descendants. The question arising under this state of facts is, whether the portion of the real estate belonging to this child, and acquired under the will, went exclusively to



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her brothers and sisters of the whole blood, or whether they took it jointly with the brothers and sisters of the half blood. The Circuit Court determined that her portion of the real estate, acquired by the will, went to the brothers and sisters of the whole blood, and made partition accordingly; and from this judgment this writ of error has been sued out.

Our statute prescribes that all Courts, and others concerned in the execution of last wills, shall have due regard to the direction of the will, and the true intent and meaning of the testator in all matters brought before them. This provision is declaratory of a principle which the Courts have always regarded in the construction of wills. But under it, it has never been allowed to make a will for a testator. We cannot substitute ourselves for the testator, and say what he would have done under a concurrence of circumstances, not foreseen at the time of the execution of the will. The intention of the testator must be collected from the will itself. In cases of ambiguity, the circumstances under which a will is made, have been received to explain it. But this is never permitted when there is no doubt, or in order to raise a doubt.

But for the clause in the will which has been recited, it is clear that the land in controversy would have been inherited, in part, by the children of the half blood. If they are excluded, it must be by the limitation above expressed. The limitation over to the surviving children, by the last marriage, was in the event of any of them dying under age or unmarried. The child whose portion of the real estate is sought, in part, her brothers and sisters, of the half blood, did, it is true, die under age, but not unmarried. There were two events, either of which would free the estates of the children by the last marriage from any contingency, namely, the dying under age or marrying. I know not on what principle the limitation on a child's estate would be continued after a marriage under age, until his majority. Such a construction would, in the event of a child's dying under age, leaving children, exclude them from the inheritance, which surely could never have been intended. The clear implication from the will is, that by attaining a majority, or marrying, the estate of a child was freed from any limitation and became absolute. The other Judges concurring, the judgment will be reversed, and the cause remanded.

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*Kring & Johnson vs. Green's Executors.*

## KRING &amp; JOHNSON vs. GREEN'S EXECUTORS.

Executions in favor of A., issued by a justice of the peace, were levied on personal property of B., by the constable. The same property was then taken by the sheriff, on executions in his hands, and sold; not being sufficient, the sheriff also sold certain real estate of B., on which C. and D. had a mortgage given subsequent to the issuing of the sheriff's executions. C. and D. purchased the real estate at the sheriff's sale for an amount greater than the executions in his hands, and retained the excess.

Held:—

On a bill filed by the sheriff, to compel A. and C. and D. to interplead, that the executions in favor of A. were entitled to be paid out of the surplus in the hands of C. and D., although such executions were no lien on the land, they were on the personal property sold by the sheriff, and the proceeds of that sale having reduced the lien against the real estate, must be applied to their payment.

## APPEAL from Howard Circuit Court, (in Chancery.)

LEONARD & HAYDEN *for Appellants.*

## POINTS AND AUTHORITIES.

1st. The facts stated in the complainant's bill, in relation to the \$500, in the hands of Kring & Johnson, are not such as will sustain an interpleading bill in relation to that money—and so far the bill ought to have been dismissed. Story's Eq. Pl. 3d ed. §291, 297.

2d. Admitting that, upon the facts stated, an interpleading bill may be sustained in relation to the \$500, yet the pleadings in this case, (there being nothing but the interpleading bill, with the defendant's answers thereto,) do not warrant the decree against Kring & Johnson, that they pay over to Green so much of the \$500, in their hands, as will satisfy the balance due on his two executions against Cotton.

3d. If, upon the defendant's answers to an interpleading bill, such a decree can be made in any case, the facts stated in Green's answer, do not, in equity, entitle him to the relief against Kring & Johnson, that has now been decreed to him.

TODD *for Appellees.*

## POINTS AND AUTHORITIES.

1st. That as no bill of exceptions was taken, the decree must stand, so far as the merits depend upon the evidence.

2d. That the prayer is sufficiently broad and comprehensive to justify a decree against any defendant in whose hands the money in issue may be—for constructively it is held for Ford and by him—and the allegations, (and the proof must be supposed to establish them,) are sufficiently ex-

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plicit to shew Johnson & Kring were holders for Ford's use and benefit: equity need not make a formal decree against Ford for the sum in their hands, and in favor of Ford against them—such circuitry is not necessary—the parties being all before the Court, and assenting to a trial of the issue of its distribution. 1st Wheaton 179; 9th Mo. Rep. 201.

3d. The prayer in Ford's bill, that the parties interplead for a perpetual injunction, and for general relief—and the parties, in fact, interpleading—gives the Court power to decree against any and all parties, according to the equity of the case.

4th. That the parties, appellants, are estopped from demurrer to the equity of original bill—presenting their answer as a statement of claim to the fund before the Court, waives previous irregularity, and waives even decree to interplead.

5th. The practice of Court would authorize a rule, order or decree for the money to be brought in at any time before or after final hearing—and upon the facts interplead by the parties, will justify the decree.

6th. The appellants cannot object to the sufficiency of the bill of interpleader, they should have had a decree to interplead, and have appealed from it, if against them—they waived such decree, and agreed the answers filed should form the issues, and went to trial thereon—it waives all objection to the sufficiency of the interpleading bill.

*McBRIDE, J., delivered the opinion of the Court.*

In October, 1841, Ford filed a bill in the Howard Circuit Court against Green, Johnson, Kring, and others, in which the following facts are charged:—

In March, 1838, several judgments were recovered against Cotton, in the Howard Circuit Court, and afterwards in April, 1838, several transcripts of justices' judgments were filed in the clerk's office of that Court against Cotton, and upon which executions to the amount of about \$1745, were issued, and delivered to the sheriff of Howard county, on various days between the 2d and 10th April, 1838, and levied on the same day that they went into the sheriff's hands, upon all the real and personal property of Cotton in Howard county.

On the 3d March, 1838, Joel H. Green recovered two justices' judgments against Cotton, for the total amount of about \$270. On the 6th March, 1838, executions were issued, and delivered to the constable of Richmond township, in Howard county, and on the 10th day of the same month, they were levied by the constable upon a portion of the personal property of Cotton. These executions were renewed respectively on the 5th April and 5th May, 1838, for thirty days, and finally returned on the 19th May, 1838, "property unsold for want of bidders."

On the 14th April, 1838, and on the 18th May, 1838, Cotton executed several mortgages to Johnson, Kring, and others, upon 40 acres of land, and his tavern, in the county of Howard, to secure a total amount of about \$1200, and these mortgages were filed for record on the same day they were executed respectively.

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*Kring & Johnson vs. Green's Executors.*

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The sheriff sold the personal property under the executions in his hands, and it yielded about \$735. This embraced all of the personal property seized by the constable under Green's executions. He then sold the forty acre lot of land for \$100, which left a balance due upon the executions in his hands of about \$910. The tavern was then sold and bought in by the defendants, Kring and Johnson, who made the purchase for the benefit of several persons secured by Cotton's mortgages upon the property. They bid \$1550, of which they paid to the sheriff \$1050, and retained in their own hands the balance, \$500, with an understanding that it should be considered as a loan from Ford to themselves—they, however, insisting at the same time, that it belonged to them, and the other mortgagees upon the property.

In December, 1840, executions were issued upon Green's judgments against Cotton, and Ford, the sheriff, was summoned as garnishee upon these executions, and having admitted, in his answer to the interrogatories exhibited against him, that he had money in his hands belonging to Cotton, and collected by him as sheriff, judgments were rendered against him for the several amounts due upon Green's judgments. It was agreed, however, between Ford and Green, that the judgments against Ford, as garnishee, should not be collected until the determination of the suit at law that Ford had instituted against Kring and Johnson, for the \$500 in their hands, the balance of their bid for the tavern, and then only in the event that the right to the money should be settled in favor of Ford.

Johnson and Kring claim the \$500 as mortgagees of Cotton's real estate, in Howard county, and Green claims so much of it as may be necessary to satisfy his executions against Cotton, by virtue of the levy of these executions upon Cotton's personal property by the constable.

The prayer of the bill is, that the claimants, Green, Kring, Johnson, and the other mortgagees may interplead so as to determine their right to the money in dispute, and for an injunction against the collection of Green's judgments against Ford, as garnishee, until the final disposition of the cause.

In February, 1842, Green filed his answer. He admits the judgments, executions, and proceedings thereon, against Cotton, as mentioned in the bill, and admits the judgment and proceedings thereon against Ford, as garnishee; but denies that the latter judgments were taken upon any agreement of the kind stated in the bill. He admits the Circuit Court judgments and executions against Cotton, and proceedings thereon, as stated in the bill, but denies all knowledge of their mortgages—of Kring and Johnson's purchase of the tavern for the benefit of the mortgagees,

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and the agreement between Ford and Kring and Johnson, that \$500 of the purchase money, bid for the tavern, should remain in the hands of the latter as a loan. He insists that he is entitled to the proceeds of the personal property to satisfy his executions, in preference to the Circuit Court executions, under which the property was sold, and that the matters set up by the complainant Ford, afford no ground to protect him from the judgment against him, as garnishee.

In conclusion, Green prays that his answer may be considered as a cross bill—that his co-defendants may be made defendants thereto, and compelled to answer the same, and that the funds in Ford's hands may be distributed according to priority of lien, so as to satisfy his executions in preference to the Circuit Court executions, in the event of the Circuit Court sustaining the bill, but insists that the bill of complainant ought to be dismissed, and he allowed the benefit of his judgments at law against Ford.

On the 30th May, 1842, Kring, Johnson, and others answered. They deny that Kring and Johnson retained the money in their hands under an agreement that it should be considered a loan, and admit all the other matters charged in the bill, so far as they have any interest in, or knowledge of the same.

They set up and insist upon their right to the \$640, overplus of proceeds of sales of real estate, after satisfying the Circuit Court executions, and deny that Green has any right to satisfaction of his judgment out of the fund in the complainant's hands.

In October, 1842, Green, by leave of the Court, and with the assent of the parties, withdrew his cross bill. The summons was served on the other defendants, and the bill taken as confessed against them, for want of an answer in May, 1843, and on the same day Green filed a replication to the answer of his co-defendants.

On the 22d December, 1843, the cause was heard and a decree made that Green's two executions are entitled to the \$139 76, being the balance of the proceeds of the sale of Cotton's real estate, in Ford, the sheriff's hands, and directing him to pay over the same accordingly; and that the balance due on said two executions, is \$242 15, and that Green is entitled to payment of the same out of the proceeds of the sale of real estate in the hands of Kring and Johnson, and directing them to pay the same over accordingly—the costs are also decreed in favor of Green and Ford, against the defendants.

From this decree, the defendants, Kring and Johnson, have appealed to this Court.



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*Kring & Johnson vs Green's Executors.*

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The first point raised by the counsel for Kring and Johnson, in this Court, is one which should more properly have been made in the Court below, but which it appears escaped the vigilance of the counsel until the present time. If the defendants had demurred to the bill because the facts stated would not authorize a bill of interpleader as against them, an opportunity would then have been afforded the complainant, if the demurrer was well taken, to have amended his bill so as to have obviated the objection to it, if in his power to do so. His right to amend, and thereby present his case to the Court, in the most objectionable form, has been cut off by the course of proceeding on the part of the defendant; notwithstanding, we shall examine the objection now taken and see if there be any force in it.

"It is observable, (Story's Eq. Pl. §806,) that the jurisdiction of Courts of equity to compel an interpleader, follows to some extent the analogies of the law. It is properly applied to cases where two or more persons claim the same thing, by different or separate interests from another person, who, not claiming any interest therein himself, and not knowing to which of the claimants he ought, of right, to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties; and therefore applies to a Court of equity to protect him, not only from being compelled to pay or deliver the thing claimed to both the claimants, but from the vexation attending upon suits, which may possibly be instituted against him." (See also Cooper, &c., and Chitty, &c., 1 Bur. R. 37.)

The case at bar comes fully within the rule laid down by Story; for here, Green and Kring and Johnson claim the fund in Ford's hands, by separate interests from him, who not claiming any interest therein himself, and not knowing to which of the claimants he ought of right to pay the money, and being sued and judgment had against him in favor of Green, he files his bill of interpleader.

It has been intimated by the defendants, that the fund in question was not in the hands of Ford, and therefore he had no right to call upon the parties claiming it, to interplead and establish their rights. This objection may be met by two facts stated in the bill; first, the proceeds of the sale of the property of Cotton, after satisfying the executions in Ford's hands, left a balance of \$644 79-100; second, Ford in his answer to the garnishment of Green, admits the balance above to be in his hands, and in his bill alleges that \$500 of that balance was loaned to Kring and Johnson, the defendants. So far, therefore, as Ford is concerned, the money

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is in his hands, and it does not become the defendants, under the circumstances under which they retained the \$500, in their hands, to say that it is not in contemplation of law, in Ford's hands. It ought to be there, and for all the purposes of this suit, it will be considered as in his hands.

Do the facts stated by Green in his answer entitle him to be paid his debts out of this fund? He alleges that his executions were in the hands of the constable of Richmond township, in Howard county, the residence of the defendant Cotton, and were, by the said constable, levied on the personal property of Cotton, prior to the emanation of the executions from the clerk's office of the Howard Circuit Court, and which were subsequently levied by the sheriff of the said county, on all the real and personal property of Cotton, including that levied upon by the constable under his executions—that the sheriff sold the whole of the property, commencing with the personal property, and applied a sufficient amount of the proceeds of the sale to the payment or satisfaction of the executions in his hands—that after satisfying all the executions in the sheriff's hands, there remained a balance of \$644, or thereabouts. That his executions and levy being prior in date to the executions in the hands of the sheriff, should have been first satisfied; and that the executions in the sheriff's hands were prior in date to the mortgages under which Kring and Johnson claim the right to retain the balance of the purchase money.

If we understand the position assumed by the attorney for the defendants, it is stated that the balance in Ford's hands, of \$644 79-100, was produced by the sale of the real estate of Cotton, to-wit: the tavern house; and that as the executions of Green issued from a justice's judgment, and were no lien on real estate, therefore, Green has no right to have this balance, or any part of it, applied to the satisfaction of his executions; that if Green had a prior lien, it was on the personalty, and should have been satisfied out of the sale of the personal property by the sheriff.

But whether Green's executions were satisfied out of the *identical* money received for the sale of Cotton's personal property, or out of the proceeds of the sale of the real estate, cannot make any difference to Kring and Johnson; for, if paid out of the first fund, it would have left a larger balance remaining unsatisfied, on the executions in the sheriff's hands, and which would have to be made out of the real estate. It was the duty of the sheriff to first satisfy the elder lien, in the constable's hands, out of the proceeds of the sale of the personal property, which had been seized by the constable, under Green's executions, and then

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*Davis vs. Tuttle & Epperly.*


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apply the balance to the executions in his hands. Two reasons would appear to dictate this course, in the present case; the lien of Green had priority; and as it was a judgment before a justice of the peace, and could not be enforced out of the real estate, whilst the others were Circuit Court judgments, and operated as liens on the real estate, if equal in point of time, still Green's execution should have been preferred.

This would be a principle of justice as between execution creditors, and we cannot perceive how it could operate an injury to the defendants here, who took their mortgages on the property of Cotton, charged with the lien and incumbrances of these several judgments.

For the foregoing reasons, the decree of the Circuit Court should be affirmed, and the other Judges concurring, the decree is affirmed.

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 DAVIS vs. TUTTLE & EPPERLY.
 

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Under the act of 1841, a plea of usury should set forth distinctly the usurious contract.

## ERROR to Macon Circuit Court.

*Todd, for Plaintiff in error, contended:*

1st. The plea is double, multifarious; is part for usury; part in payment.

2nd. There was no evidence to prove the plea of usury.

The judgment was irregular and should be set aside:—

I. Because it was entered without a trial and finding of either issue between the parties, for defendants.

II. If there was no issue made upon the plea of usury, and no trial of it, then the judgment was given upon demurrer without default taken.

III. If there was an issue on the plea, the Court gave judgment upon it, without evidence, and any finding of the issue.

IV. The judgment without finding the issues, or without evidence for the County of Macon, is irregular and prejudicial to plaintiff.

V. The judgment, if the plea was true, should be for the plaintiff for all but the sum of \$76 91 cents previous usury, and 10 per cent. upon the residue after the note became due; and the judgment for the County should be only for such 10 per cent. after due.

VI. But it is insisted that the allegation of the sum of \$76 91 being usurious on previous contract, and included in the note sued on, shows the note to be without consideration for that sum, and should be so pleaded; and is not a usurious contract in making the last note. See statute of 1840, referred to in defendant's brief.

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*Davis vs. Tuttle & Epperly.*

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*GILSTRAP, for Defendants in Error:*

Makes the following points before the Court:—

1st. A general demurrer will be sustained only when the plea or other pleading is defective in substance. See 1 vol. Ch. pleading, page 702. Revised Code Mo., page 458, §13 and 14.

2nd. The giving of a new note does not put an end to a usurious contract, if the usurious contract be still preserved and so averred in the plea, but is an indirect promise to the end to obtain a higher rate of interest than is lawful. See Session Acts of 41, page 95.

3rd. The Court did not err in overruling the plaintiff's demurrer, nor in refusing a new trial for the reasons above stated.

*SCOTT, J., delivered the opinion of the Court.*

This was an action on a promissory note for the payment of \$170 78, brought by the plaintiff in error against the defendant in error. The proceeding was by petition in debt. Two pleas were filed to the action, *nil debit*, and a special plea of usury, setting forth that said plaintiffs ought not to have and maintain their said action against them, because they say, that on the 1st day of January, A. D., 1840, at the County of Macon, and State of Missouri, before the making of the promissory note in the petition mentioned, it was corruptly and against the form of the statute in such case made and provided, agreed by and between the said plaintiff and the said defendants, that the said Daniel G. Davis should loan and advance to the said N. W. Tuttle, the sum of three hundred and fifty dollars, and that for and in consideration of the said Davis forbearing and giving day of payments upon the said sum from the date last aforesaid, until the 25th day of December, 1840, it was then and there corruptly and unlawfully agreed by and between the said plaintiff and defendant Tuttle, that said Tuttle should pay more than lawful interest at and after the rate of ten per cent. per annum on said sum of three hundred and fifty dollars, that is to say, to-wit: on the said 1st day of January, A. D., 1840, at the County and circuit aforesaid, the sum of ninety-six dollars and eighty-seven cents, which, together with the sum of three hundred and fifty dollars, so to be lent and advanced as aforesaid, by said plaintiff to said Tuttle, made and amounted to the sum of four hundred and forty-six dollars eighty-seven cents, and that for the security of the payment of said sum so loaned and advanced, and the usurious interest so agreed to be paid by said Tuttle to said Davis, the said defendant Tuttle did then and there, to-wit: on the day and date last aforesaid, make and execute his promissory note with Samuel Richmond as his security, for the said sum of four hundred and

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*Davis vs. Tuttle & Epperly.*

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forty-six dollars and eighty-seven cents, and in pursuance of said unlawful contract and agreement, delivered said note so executed as aforesaid, to said Davis, plaintiff as aforesaid. And the defendants aver, that afterwards, to-wit: on the 4th day of March, 1841, at the county and circuit aforesaid, the said plaintiff received from the hand of one Thos. K. White, for and on behalf of said Tuttle, in part discharge of said last mentioned note, the sum of one hundred and seventy-five dollars, and afterwards, to-wit: on the 1st day of August, A. D., 1841, the said defendant Tuttle, delivered to said Davis, a certain note of hand upon a certain James Wisdom, for the sum of one hundred dollars; and that afterwards, to-wit: on the 14th day of September, 1841, the said Davis, plaintiff as aforesaid, received of and from the said defendant Tuttle, the sum of one hundred and thirty-four dollars, amounting in all to the sum of four hundred and nine dollars; and afterwards, to-wit: on the said 14th day of September, A. D., 1841, in pursuance and further consideration of said unlawful, usurious and corrupt agreement, for the use, forbearance, and giving day of payment upon the sum of three hundred and fifty dollars, as above stated; and after the payment as above stated, to-wit: on the day and date last above written, at the county and circuit aforesaid, it was further unlawfully and corruptly agreed by and between the said plaintiff and defendant, that if the said defendant would renew and make a new note for the balance that would remain after deducting the credits aforesaid, from the principal so advanced and loaned as aforesaid, and the remainder of the usurious interest as aforesaid, together with 25 per cent. per annum on said balance, &c., the said plaintiff would give time and further day of payment until the 14th day of September, A. D., 1842; and in pursuance of which said last mentioned corrupt and unlawful agreement, the said defendants gave and executed to the said D. G. Davis, plaintiff as aforesaid, the note in the petition mentioned. And said defendants aver, that the said sum of one hundred and seventy dollars, seventy-eight cents, the amount in the note in the petition mentioned, is the residue of what remained of the principal and usurious interest as first above agreed upon, together with the 25 per cent. per annum on said residue. That seventy-six dollars and ninety-one cents of said note in the petition mentioned, is usurious and unlawful interest, which had accrued, and was due from the said defendant Tuttle, to said plaintiff, before and at the time of the execution of the note in the petition mentioned, and that twenty-five dollars, part and parcel of said sum of one hundred and seventy-seven dollars in the note in the petition specified, is the usurious interest over and above



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*Davis vs. Tuttle & Epperly.*

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the rate of ten per cent. per annum interest, which was then and there agreed to be paid for the forbearance, and giving day of payment upon the said last mentioned sum as specified in said note in the petition mentioned; and this they the said defendants are ready to verify, wherefore they pray judgment if said plaintiff should have and maintain his said action thereof against them, &c. To this plea there was a demurrer, and on the demurrer judgment was rendered that the defendants recover of and against the said plaintiff their costs and charges by them in this behalf expended, and that they have thereof execution; and it is further considered by the Court here, that the County of Macon recover of and against the said defendant, the sum of forty-nine dollars and five cents for her damages, and that she have thereof execution. The note on which suit was brought, bore date 14th September, 1841. The plaintiff in the suit below sued out this writ of error.

The note on which this suit was brought, was executed under the law of the 27th January, 1841, entitled "An Act to amend an Act entitled an Act regulating interest of Money." This act directed that if the plea of usury be sustained, the judgment should be for the sum actually lent and interest on the same at the rate of ten per cent. per annum. The plaintiff taking only his principal, or sum lent, and a judgment being rendered for the County in which the suit is brought, for the ten per cent. interest.

The objection to the plea is, that the usurious contract is not set forth with that degree of precision necessary to enable the Court to give judgment upon it. The proceedings in this cause took place before the late revision, under a law which required that the special facts should be set forth in a plea of usury.

We are of opinion that the objection to the plea is valid. After many attempts, we have not been enabled to ascertain from the plea the data on which the judgment is predicated. We have been unable to arrive at the conclusion to which the Court came. Indeed, if the plea is properly understood, it contains an admission that a part of the sum for which the note was given was money actually loaned, and yet there is no judgment for the plaintiff for any thing.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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*Skinner vs. Henderson.*

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## SKINNER vs. HENDERSON.

1. An action will lie to recover back money paid under an illegal agreement, at any time before the agreement is executed.
2. A deed having been made for the performance of an illegal contract, by consent of parties, is destroyed before the contract is performed with a view to its rescission. In an action to recover back money paid under the contract, evidence of the contents of the deed may be given.

## ERROR to Platte Circuit Court.

*STRINGFELLOW, for Plaintiff in Error:*

It is insisted that the Court erred in excluding the evidence offered by plaintiff. The action being for money had and received, not only was the copy admissible to show the contract, but the evidence of Mrs. Bywaters was clearly admissible to show the rescission of the contract. The receipts were unquestionably evidence, as was the evidence offered to show the cancellation of the contract, and that defendant had not complied with his part of the contract. Assumpsit is the proper action to bring for money had and received under a contract which has been rescinded.

2. The exceptions to the exclusion of the evidence were properly taken. It is shown by the record that they were taken on the trial.

*ALMOND, for Defendant in Error:*

1. The points and grounds set forth by the plaintiff in his motion for a new trial, are not saved and preserved in the bill of exceptions, for reasons:—

I. The bill of exceptions does not show that the plaintiff excepted, *at the time*, to the opinion of the Court in excluding the copy of the bond therein set forth.

II. Said bill of exceptions does not show that the plaintiff excepted at the time to the opinion of the Court in excluding the receipts and other parol testimony therein set forth as offered by plaintiff, and excluded.

III. And the sweeping expressions used in the bill of exceptions towards the close of it twice, "all of which opinions of the Court were excepted to on the trial," "to all of which opinions of the Court in excluding from the jury the said receipts, and the said copy of the said bond, and the said parol evidence so offered as aforesaid, the plaintiff by his counsel excepts," are not sufficient to save those points respectively. For the exceptions may not have been taken at the respective times of the exclusion. Missouri Reports, vol. 5. *Waldo vs. Russell*, page 387.

IV. The bill of exceptions does not show and set forth as it should, the specific grounds and reasons on which the evidence of the plaintiff was excluded, and the Supreme Court can not therefore say whether the Circuit Court decided right or wrong. Mo. Rep., vol. 8. *Fields vs. Hunter*, page 128.

V. Where the bill of exceptions is doubtful and ambiguous, the Court will not intend any

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*Skinner vs. Henderson.*

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thing for the benefit of the party whose duty it was to make the matter plain. Mo. Reports, vol. 2. Collins vs. Browner, p. 158.

2. The action in this case is *assumpsit* on the common counts. And the plaintiff seeks to recover exclusively on the bond once in existence, but before suit brought, burnt and destroyed by defendant, with the consent of the plaintiff, and as he imagined, as a favor to him and for his benefit, by proving or attempting to prove, as I suppose, that defendant had not complied with his part of the bond after he had received the payments therein stipulated.

The defendant contends that the copy of the bond was properly excluded, for the following reasons:—

I. The copy professes to have been signed, sealed and delivered in the presence of John C. Bywaters and Eli Shepherd, as subscribing witnesses. We have no right to infer from similarity of names, that the witness, John C. Bywaters, is the same person who subscribed the deed as a witness, and if we could so infer, he no where proves the execution of the original or even attempts it. Starkie on Evidence, vol. 1, pages (top paging) 320, 323 and 340.

II. If the statement of Bywaters, that plaintiff and defendant placed the original in his possession for safe keeping, be construed to prove an admission by defendant of the due execution thereof, (which under the rules of law can not be so construed,) still the subscribing witnesses ought to have been called, and proved its execution;—and as there was suspicion strong about the original, both witnesses ought to have been called and examined. Starkie on Evidence, vol. 1, page 320, or their absence accounted for.

III. The plaintiff voluntarily, and without mistake, or accident, destroyed the original, and he thereby deprived himself of the right to produce and use secondary evidence. Starkie on Evidence, vol. 1, top page, 349. Note 1 at the bottom.

IV. The presumption of law and of common sense is violent, that Skinner, having paid the money, and Henderson having complied with his stipulations as set forth in said deed, they met as proved, and mutually destroyed the instrument. The contract therein having been fully consummated. At least, when they destroyed said deed, they destroyed all their rights—and all evidence of those rights, contained in the same.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of *assumpsit* on the general counts brought by Skinner against Henderson, in which Skinner submitted to a non suit, and after an unsuccessful motion to set it aside, has brought the cause to this Court.

Henderson, it seems, by deed, leased to Skinner a right of preemption he possessed on the public lands, for the term of ninety-nine years, for a large sum of money. The object of the lease was to evade the act of Congress prohibiting the sale of a preemption right until the issuance of a patent therefor. Understanding afterwards that such an agreement was not valid, the parties mutually consented that the lease should be burned, which was accordingly done, and the contract was considered rescinded by them. In the meantime, Skinner had made large payments to Henderson under the lease, and this suit was brought to recover them. On the trial, a copy of the lease was offered in evidence, and several receipts for money under the contract by Henderson: all these papers

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 Finney vs. Turner.
 

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were excluded by the Court, and this action of the Court is the error complained of.

The rule in respect of money paid on illegal contracts appears in general to be, that money so advanced may be recovered in an action for money had and received, while the contract remains executory, because a violation of the law is thereby prevented; but if the contract be executed, it cannot be recovered back. When both parties are in *puri delicto*, *melior est conditio de fendenis*, not because he is favored in law, but because the plaintiff must draw his justice from pure sources. B. N. P., 132. Doug. 470.

Here the contract was not executed, the parties availed themselves of the *locus penitentiæ*, and rescinded their bargain, consequently the money paid under it may be recovered. It may be remarked in regard to the refusal to admit secondary evidence of the deed, that it is by no means a matter of course to permit a party to give secondary evidence of the contents of an instrument, although the fact of its destruction is clearly proved. A party who will voluntarily, and without cause, deprive himself of original evidence, will not be permitted to use the secondary. The deed being destroyed with mutual consent of parties, and with a view to rescind an unexecuted contract which they learned was illegal, the authorities will amply sustain under such circumstances the introduction of secondary evidence. Riggs vs. Taplor, 9 Whea. 483. The evidence of the execution of the deed was sufficient to have permitted it to go to the jury.

The bill of exceptions stated, that "*all of which opinions of the Court in excluding from the jury the said receipts and the copy of the bond were excepted to on the trial;*" and it is contended that it does not sufficiently appear from such language that the exceptions were taken at the time the opinions were given. We are of opinion that the bill of exceptions is sufficiently explicit to show that the exceptions were taken at the proper time.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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 FINNEY vs. TURNER.
 

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1. In an action upon a note, it is not necessary for the plaintiff to explain an erased endorsement found upon the note. The defendant must prove the endorsement to have been made to transfer the right to the note, to use it as a defence.

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*Finney vs. Turner.*

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2. A joint demand can not be set off against a separate debt.
3. One partner can not set off a debt against the partnership, before a settlement, against a separate demand of the other partner.

**ERROR to Carroll Circuit Court.****TURNER, for the Appellant, insists :**

1. That the Court erred in overruling the motion to strike out a part of the notice to set off.
2. That the Court did not err in permitting the note to be read in evidence.
3. That the Court erred in admitting the evidence introduced by the defendant.
4. That the Court erred in not excluding the said evidence after it had been given.
5. That the Court erred in refusing the several instructions asked on behalf of the plaintiff and in giving those asked on behalf of the defendant.
6. That the Court erred in refusing to set aside the judgment of non-suit, and to grant the plaintiff a new trial.

**ABELL for the Appellee.**

The assignment on the note is evidence admissible, to show the plaintiff had no right to sue. *Jeffries vs. Oliver*, 5 Mo. Rep.

The evidence introduced by the defendant, to sustain the plea of off set, was proper and legal, as well as that portion of it in relation to payment by the defendant, of another debt, for the payee of the note.

**NAPTON, J., delivered the opinion of the Court.**

This was a petition in debt on a note executed by Turner to one Major, and by Major assigned, without recourse, to the plaintiff, Finney. The defendant pleaded *nil debet*, and gave notice of a set off. In this notice it was alleged that the defendant, (Turner,) and the payee of the note, (Major,) were co-partners in the carpenter's trade, and that a debt was contracted by the firm, which Turner paid, one-half of which payment the defendant claims as set off. It was also stated that an account was due the firm of Turner & Hamner, by the said firm of Turner & Major, (the defendant being a member of each firm,) and this account, which had been transferred to Turner, was also sought to be used as a set off. The plaintiff moved to strike out so much of the set off as related to these two items, but the motion was overruled and an exception taken.

On the trial, after the plaintiff had read the note and assignment, the defendant proved by Hamner, a member of the firm of Turner & Hamner,



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*Finney vs. Turner.*

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that previous to the assignment of the note sued on, the defendant and said Major were co-partners in the building of a certain house. That as such partners, they purchased and used in the building of said house a quantity of lumber, amounting in value to about \$386, and that defendant paid for said lumber. The same witness proved that he and the defendant paid for said lumber. The same witness proved that he and the defendant were in co-partnership, and as such, had an account against Major for about fifty dollars, which account, previous to the assignment, had been transferred by the witness to the defendant. This testimony was objected to, but admitted by the Court.

The defendant then read in evidence an erased assignment of the note sued on, written on the back of said note, and bearing date previous to the assignment to the plaintiff. Across this endorsement black lines were drawn, but the writing remained legible. This was objected to, but permitted; and the Court expressed an opinion in accordance with instructions to that effect, submitted by the defendant, that after a note had been assigned, it could not be transferred back to the assignor by a mere cancellation of the endorsement, and if an erasure of an assignment appears on a note, it is incumbent on the holder to explain such erasure in a suit on the note.

The plaintiff, in consequence of these opinions of the Court, took a non-suit, which he afterwards moved to set aside, and the motion to set aside being overruled, he took a bill of exceptions, and has appealed to this Court.

1. The first point in this case is the one presented by the instructions of the Court. Allowing the first proposition of the instruction to be correct, in the abstract, yet the latter part in relation to the burthen of proof, in case of an erased endorsement, is erroneous, and under the circumstances compelled the plaintiff to take a non-suit. The mere fact of an erased endorsement appearing on the face of the note, does not *per se* prove an actual assignment. There may have been no delivery, or the writing may have been the act of a stranger. The case of *Davis vs. Christy*, which may have been thought to authorize the doctrine acted on by the Circuit Court, was a case in which the defendant *proved* that the obligee of the bond had assigned it for a valuable consideration, by a writing endorsed on the bond; that the assignee, designing to transfer it again, instead of assigning it over to his intended vendee, took it to the obligee, and after cancelling the endorsement to himself, had it assigned directly to that vendee. The Court would not permit a recovery under such circumstances. In the present case the only proof offered of an

*Paulding, et al. vs. Grimsley, &c.*

assignment was the production of the note, with an erased endorsement. No circumstances or facts calculated to throw any suspicion upon the instrument appeared, but upon this alone the Court gave the instructions complained of. The rule of law is, that every thing is presumed to be done rightly until the contrary be proved, and therefore this erasure of itself should not have raised a presumption unfavorable to the holder of the note.

2. In relation to the set offs offered and admitted, the first was an account due by Turner & Major, and the payment of this account by Turner alone. This payment, it is obvious, could not of itself create an indebtedness on the part of Major. A settlement of the partnership concerns could only show this, and this could not be ascertained in the present action.

3. The second item of set off, was an open account of Turner & Hamner. Upon this it may be sufficient to observe that a joint demand is not permitted to be set off against a separate debt. *Dale vs. Cook*, 4 J. Ch. R. 11; *Duncan vs. Lyon*, 3 ib. 351; *Brown vs. Thompson*, 1 Cox N. J. R. 2. Our statutes of set off is similar to the British statutes of 2 Geo. 2 ch. 22 §13, and 8 Geo. 2 ch. 24 §5; and upon those enactments it has been uniformly held, that the debts must be mutual and due in the same right. If the case of *Austin vs. Feland & Graves*, 8 Mo. R. 309, be considered a departure from this rule, the reasons given for the deviation in that case from the construction of the British statute will be found to exclude the present case from any such relaxation from the ancient doctrine.

The other Judges concurring, the judgment of the Circuit Court is reversed, and the cause remanded.

PAULDING, ET AL. VS. GRIMSLEY, TRUSTEE, &c.

A pre-emption right, under the act of Congress of June, 1840, can not be transferred.

APPEAL from Shannon Circuit Court.

STRINGFELLOW, NABB & MINOR, for Appellants.

To reverse the judgment below, it is contended:—

1st. That the bill is multifarious in making G. Paulding a party—he has no interest in the proceeding. *Berry vs. Robinson*, 9 Mo. R. 276.

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*Paulding, et al. vs. Grimsley, &c.*


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2d. Grimsley is no party to the ejectment suit, and could not enjoin it. *Moses vs. Lewis*, 4 Con. Eng. Ch. 236.

3d. The only right, if any, of Paulding to the land, was a pre-emption which could not be sold. Pre-emption Law 1838-'40.

4th. The deed did not profess to convey any such land—or any interest therein.

5th. If the land were entered by Paulding's money, it was not with the trust funds, and Grimsley could not claim any benefit.

6th. The bill admits the money to have been Philips' by tendering the same with interest.

7th. The decree is, "that all the defendant's convey," when Geo. Paulding had no sort of interest in the land, legal or equitable.

### HICKMAN, LEONARD & BAY, *for Appellee.*

1st. The evidence is not preserved in the bill of exceptions, and the Court cannot therefore determine whether or not the decree was warranted by the evidence.

2d. The act of Philips, in entering the land, was a fraud upon the rights of the creditors of Paulding.

3d. The third section of the statute, concerning conveyances, passed all the title of Paulding on the entry of the land by Philips, to the use of Paulding, and it was necessary to file a bill in equity to obtain the conveyance of the naked legal title fraudulently vested in Philips.

### NAPTON, J., *delivered the opinion of the Court.*

This was a bill in chancery brought by Thornton Grimsley against Jno. M. Paulding, George Paulding, and Henry Philips. The bill represented that John W. Paulding executed to the complainant a deed conveying to him, as trustee, for the benefit of his creditors, (of whom said complainant was one,) all his lands, tenements, and hereditaments, and interest in the same wheresoever situated, and all his goods, chattels, property, merchandise, &c. Annexed to the deed was a schedule purporting to contain a list of the property designed to be conveyed, both real and personal. At the time this deed was executed, the bill proceeds to state the said Paulding had made valuable improvements upon the southwest quarter of section No. 36, T. 30, R. 5 west, in the Jackson land district, so that by the laws of the United States, he (said Paulding) was entitled to a pre-emption thereon. The bill asserts that these improvements, and this pre-emption right of Paulding, passed, by the deed of trust, to said complainant, although it was not specifically mentioned in the schedule. The bill further states that shortly after the execution of this deed, the complainant took possession of the improvement heretofore mentioned, by his agent, and with the consent of said Paulding, and had already expended money arising from the trust fund, in enlarging said improvement. The bill then charges that Paulding, with a view to cheat and

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defraud his creditors, and to prevent them from deriving the full benefit of the deed of trust, procured one Henry Philips, (who is therefore made a defendant,) to enter said quarter section at the land office, with the secret understanding that the legal title, so acquired, should enure to the benefit of the said Paulding; that the money paid into the land office was in fact the money of said Paulding, and not of Philips; that said Paulding had previously attempted to procure two other persons, whose names are given, to enter said land for him, but had failed; that he finally furnished his son George Paulding, (also made a defendant,) with money to enter the land, and that it was so entered by said George, in the name of said Philips, in pursuance of a fraudulent understanding between these persons.

The bill alleges that Philips has commenced an action of ejectment against complainant's tenant, on the legal title of said Philips, and prays an injunction against said proceedings at law; it also prays that Philips may be compelled to convey, and tenders to said Philips the purchase money.

To this bill a demurrer was filed, but the same being overruled, the defendants put in their answers. Philips in his answer, admits the entry of the quarter section described in the bill, but asserts that he entered it with his own money, and for his own sole use, and denies all fraud and combination whatsoever. The answer of John W. Paulding admits the execution of the deed to Grimsley, but denies that the quarter section entered by Philips was conveyed, or attempted to be conveyed by that instrument, and relies for this conclusion upon its omission from the schedule. He states that as he neither resided on the land, or had any personal possession of it, and as his pecuniary embarrassments forbade his entering it, he regarded it as public land. He disavows all interest in the land, denies all fraud and confederacy with Philips, admits that he at one time desired to enter it, and probably applied to others to enter it for him, admits that he advised Philips of the vacancy, and preferred that Philips should get it to Grimsley, who, he asserts, was anxious to enter the land for his own benefit, and not as trustee, &c.

George Paulding, in his answer, admits that he entered the land in controversy for Philips, and with Philips' money, but denies all combination, fraud, &c.

These answers were excepted to, and the defendants being ordered to answer more fully, filed their amended answers. There is nothing, however, in the amended answers which materially varies the state of the case. Upon the hearing, the Court decreed that the injunction be made

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perpetual, and that the defendants surrender all right and title to the quarter section described in the bill, and that complainant pay to Henry Philips the sum of two hundred dollars, with interest, &c.

The defendants moved for a *new trial*, for reasons specified, but the motion was overruled, and the defendants excepted and appealed to this Court.

It does not appear from the record in this case, whether the complainant introduced evidence to sustain the allegation of the bill, or whether the case was heard and disposed of upon the bill and answers. As there is no bill of exceptions preserving the evidence, if any were offered, or negating the introduction of testimony at the hearing, it is impossible for the Court to look into the decree upon its merits. The only point examinable here is the one presented by the demurrer to the bill.

The bill represents that the complainant, as trustee for the creditors of John W. Paulding, became the purchaser of said Paulding's interest in a quarter section of land, and was put into possession of the same. The interest thus purchased is represented to be a pre-emption right, under the act of 1st June, 1840. The bill then charges that said Paulding, combining with his son George, and one Henry Philips, did, in fraud of the rights of his creditors, and to defeat the title conveyed by the deed of trust, cause the land to be entered by his son George, in the name of the said Philips. The complainant desired this legal title to be transferred to him, and a perpetual injunction against the ejectment suit commenced by Philips, and proffers to pay to Philips the purchase money advanced to the government. The decree of the Court was in accordance with this prayer of the bill.

There is an inconsistency, it strikes us, between the charges of the bill, and the tender of the purchase money to Philips. The ground work of the charge of fraud, consists entirely of the alleged fact that the purchase money for this land was advanced, not by Philips, but by John W. Paulding, and that the land was entered by Philips with Paulding's money, and for Paulding's secret use. Why, then, offer to return the money to Philips? Upon what principle would the Court order a return of this money to Philips, if it in fact belonged to Paulding's creditors? If, on the other hand, the money was the money of Philips, and the land was entered by Philips for his own use, then a Court of equity is called on to vacate the title of Philips, because of the fraud of Paulding.

But there are other objections to this bill apart from the difficulty just suggested. The interest which Paulding is represented to have had in this land, is a pre-emption right under the act of 1st June, 1840. What-



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ever may be the character of this interest in other respects, it is not transferable, for so the act of congress expressly declares; neither is it subject to execution, (*Hatfield vs. Wallace*, 7 Mo. R. 114,) or within the statute of frauds which requires conveyances of land to be in writing. *Clark vs. Shultz*, 4 M. R. 235. An improvement upon public land may, however, be the subject of contract. The transfer of the possession itself, constitutes a valuable consideration. But the bill of complainant assumes that the improvement and pre-emption right passed by the deed of trust. If it passed, it must have been under the general terms, "all the lands, tenements and hereditaments, and interest in the same," of the said John W. Paulding. But here was no interest in the land whatsoever, so far as the mere improvement is concerned, apart from the pre-emption right, (which is not transferable,) and accordingly we find the quarter section, upon which this improvement existed, is not enumerated in the schedule accompanying the deed. If the improvement passed to Grimsley by the mere transfer of possession, Grimsley has gotten all he contracted for—and if Paulding afterwards entered the land it is clearly liable to his debts, but there is no reason why the complainant should be entitled to the benefit of this property more than any other creditor of Paulding. The deed of trust, which was executed to Grimsley, was one which gave preferences to certain creditors, and among others to Grimsley, but if the land in question was not transferred by this deed, Grimsley has no special lien upon it, and must take the same course to subject it to the payment of Paulding's debts, which any other creditor, not preferred by the deed, must have done. The fraud, if any existed, such as is charged in this bill, may be detected and exposed, either in law or equity, and the land be levied on and sold to pay Paulding's debts.

This is the aspect of the case presented by the bill, from which it will be perceived that the entry of the land by Philips, with Paulding's money, and for Paulding's secret use, constitutes apparently the main ground of appeal to the interference of the Court of equity. Yet the proposition to return the purchase money to Philips, with which the bill concludes, seems to be founded on the hope that if the fact turned out to be that the purchase money for this land was *bona fide* the money of Philips, and had not been advanced by Paulding, there would still be sufficient ground to authorize the interference of the Court. It is true that the bill is not in terms framed with this double aspect, but it must have been so construed by the chancellor in decreeing a return of the purchase money to Philips, and a conveyance of the land to Grimsley. This decree must assume, then, that the equitable title to this land was already in Grimsley,

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the complainant, but, as we have already stated, this was not so. Indeed, if the complainant, Grimsley, had himself acquired a right of pre-emption, either by his own possession and cultivation, or by the transfer from Paulding, he has not taken the proper steps to make it available against Philips' entry. In any view which we can take of this bill it was rightly demurred to, and the demurrer should have been sustained. The decree will, therefore, be reversed, and this Court doth order and adjudge that the bill be dismissed.

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HAYDEN & SMITH vs. SAMPLE.

1. A bond for an attachment conditioned "to pay all damages which may accrue to the defendant in consequence of the attachment," will extend to damages occasioned by any proceeding in the suit, and to costs and expenses attending the trial of a plea in abatement to the affidavit.
2. In a suit upon a penal bond, a general demurrer will not lie to a count assigning several breaches if one be good.
3. Where the defendant, who had a verdict on a plea in abatement to the affidavit in attachment, brings suit upon the bond, alleging a failure to prosecute with effect, the truth of the affidavit in the attachment suit can not be enquired into.

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### APPEAL from Cooper Circuit Court.

#### HAYDEN & ADAMS, for Appellants :

1st. The demurrers should have been sustained; because, the breaches were too general.—it does not appear from any of the breaches that an issue upon the affidavit had been made and tried; although, the damages, if any, would grow mainly out of the trial of that issue; and in fact, the attachment bond does not cover any damages that might arise out of any proceeding in the suit, such as the trial of the issue referred to. The first breach alleges a judgment that might have been given after a plea to the merits, and surely, a defendant in an attachment would have no right to sue upon the attachment bond after pleading to the merits. The second breach alleges that damages had accrued in consequence of the attachment, but does not state how or on what account they accrued;—and the third breach is as general, with the exceptions of the recitals of the affidavit being made; but even this breach does not allege that there was any plea in abatement, and trial had upon the same, which was necessary before the plaintiff could recover according to the 12th section of the attachment law of 1839.

2nd. The attachment bond sued upon did not extend to any damages arising out of any proceeding in the suit, such as the issue upon the affidavit and the damages consequent upon

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the trial thereof. Yet the damages assessed mainly had reference to this proceeding. See the condition of the bond—and section 3rd of the statute of 1839, referred to above.

3rd. The appellants were not concluded by the verdict and judgment in the attachment suit, from showing that the affidavit upon which the attachment was sued out was true, and consequently that the defendant (appellee in this Court,) sustained no damages. It will be recollected, that the parties to this suit, are not the same as those in the attachment suit, and upon the breach that damages had been sustained in consequence of the attachment, they would undoubtedly have a right to show that the breach was not true—although there had been judgment upon the demurrers, yet under the statute concerning penal bonds, Digest 1835, page 431, section 7, the truth of the breaches are to be enquired into and passed upon by the jury; and under this statute the appellants had a right to show that the attachment had been properly issued and served. They certainly could not be estopped from doing this by the judgment in the original attachment suit—as they are entire strangers to that judgment.

The Court cannot judicially see or know that any of the labor or expenses of taking depositions were necessary, or pertinent to the cause, without seeing the issue made, and proofs taken to support it.

*LEONARD, for Appellee :*

*First.* The judgment was rightly given against the demurrer.

I. The condition of the present bond extends to the expenses, &c., incurred by Sample in the defence of the attachment suit, and is not limited to the damages sustained by the mere seizure of the goods. Act of 13th February, 1839, title "Attachment," page 6, sec. 3. Act of 6th February, 1837, sec. 1, title "Attachment."

II. A general breach in the words of the condition is sufficient, 1 Chitty's Plead. 326; 2 Saund. Rep. 181, b. c. Post Master General United States vs. Cochran, 2 John. Rep. 414. Hughes vs. Smith & Miller, 5 John. Rep. 168. Smith vs. Jansen, 8 John. Rep. 111.

III. If this, however, be otherwise, the count contained a good specific breach in the averments "that Sample's property was seized by virtue of the attachment, and he compelled to expend his money in the defence of the suit, whereby he incurred damages in consequence of the attachment to a specific amount, which the defendants had not and would not pay," and the demurrer being to the whole count, one good breach is sufficient. The People vs. Brush. 6 Wend. R. 458. Pinckney vs. Inhabitants of East Haddon, 2 Saund. 379.

*Second.* The testimony given by the plaintiff of the proceedings upon the plea in abatement, and his expenses incurred in supporting that plea, was properly received. The objection, on the trial, was the same involved in the demurrer to the count, that these damages were not within the condition of the present bond—and has already been considered.

*Third.* The depositions taken in the original suit and offered by the present defendants to establish the truth of the attachment affidavit, were properly rejected. The only questions for the jury on this inquest, were the truth of the breaches assigned, and the amount of damages sustained. The rejected depositions were not relevant to these questions, and if relevant, having been taken between other parties, were not competent evidence.

*Fourth.* The jury were properly directed as to the law of the case.

All the instructions, except the fourth, asked by the defendants, involve only the same questions that have already been considered. The answer to this instruction is, that these defendants cannot object that Sample's merchant's license, was applied for before, but not actually issued, until his goods were restored, and then ante-dated, so as to cover the whole time. If, however, they may make the objection, it is manifestly no reason for withholding from him the damage he sustained by the loss of the sale of his goods, when the very reason why he

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had no license, may well have been that by the act of the defendants, he had no goods to sell, and of course needed no license.

*Fifth.* The damages assessed were warranted by the evidence, and are not excessive.

McBRIDE, J., *delivered the opinion of the Court.*

This was an action of debt instituted in the Cooper Circuit Court by the State, to the use of Sample against the defendants, Hayden & Smith, upon their bond, dated May 18, 1842, payable to the State, for \$3927 04. The bond was subject to a condition, which after reciting that Faucett, Peabody & Kelly, were about to institute a suit by attachment in the Howard Circuit Court against Sample, provided, that this bond should be void, if the plaintiffs prosecuted their suit with effect and without delay, and paid all damages that should accrue to the defendant or any garnishee, in consequence of the attachment.

The declaration sets out the bond and condition, and assigns breaches, that although suit had been instituted by attachment in the Howard Circuit Court, by Faucett, Kelly & Peabody against Sample, yet, the plaintiffs had not prosecuted their suit with effect and without delay, but had so prosecuted it, that judgment was given therein, dismissing the same; that although damage to the amount of \$3000 had accrued to Sample, in consequence of the attachment, yet Faucett, Kelly & Peabody had not, and would not pay the same; and that although Faucett, Kelly & Peabody had caused the bond now sued on, with a declaration in debt and affidavit of one C. H. Bent, declaring (among other things,) that he had good reason to believe, and did believe, that the debt sued for was contracted out of this State, and that Sample had secretly removed his property to this State, with intent to defraud his creditors, to be filed in the Clerk's office of the Howard Circuit Court; and upon this bond, affidavit and declaration, had procured a writ of attachment against the property of Sample, to be issued and delivered to the Sheriff of Howard County, and Sample's personal property to the amount of \$3000 to be seized by virtue of the writ, and had so prosecuted the suit that Sample was compelled to, and did lay out \$1000, and incur large liabilities, and spend much time in the defence of the suit, and damage to the amount of \$3000 had in this manner accrued to Sample in consequence of the attachment; yet Faucett, Kelly & Peabody had not, and would not, pay the same.

The defendants demurred to the declaration, and judgment being given upon the demurrer; for the plaintiff, an enquiry into the truth of the

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breaches, and the amount of damages sustained thereby, was taken before a jury at the September Term, 1845, of the Circuit Court. Upon this enquiry, the plaintiff offered in evidence a transcript of the judgment and proceedings in the original attachment suit, from which it appeared, that on the 18th May, 1842, Faucett, Kelly & Peabody, filed in the office of the Clerk of the Howard Circuit Court, a declaration in debt, against Sample, on affidavit of C. H. Bent, an agent for the plaintiffs, and the bond now sued on executed by Hayden as principal, and Smith as security. The affidavit stated that the defendant was indebted to the plaintiffs in the sum of \$1963 52, and that the debt was contracted out of the State, and that the defendant had secretly removed his property to this State, with intent to defraud his creditors. Upon the filing of these papers, the Clerk issued an attachment to Howard County, against Sample, for the amount sworn to, interest and costs. At the return term, the defendant pleaded that he did not secretly remove his property to this State, with intent to defraud his creditors; and upon this plea, issue was taken, and after a mis-trial in October, 1842, a verdict was found in December, 1843, for the defendant, upon which he had judgment abating the suit, and for his costs. The defendant objected to so much of this transcript as contained the proceedings upon the issue on the plea in abatement, but the objection was overruled, and the transcript read.

Lewis Criglar testified, that as Sheriff of Howard County in 1842, he levied an attachment upon Sample's stock of merchandize, in his store at Fayette, took the key, and closed the store for 8 or 10 days, when Sample gave Marley and Kring as security for the re-delivery of the goods, and re-opened his store. There were more goods in the store than were necessary to secure the sum directed to be attached, but Sample told witness he intended to give security in a few days, and witness took the whole stock. When the attachment was levied, the store had been opened but a few days, and Sample had no license to sell. When he commenced business, he had applied to witness for a merchant's license, and witness directed him to go on and sell, and he would issue him the license at a future day, and afterwards accordingly did grant him a license, dated at the time he commenced business—this had been the practice in Howard County.

Mr. Marley testified, that he and Mr. Kring become security for the re-delivery of the goods to the Sheriff, upon an agreement that Mr. Richie, who was a clerk in the store, should sell the goods at retail, and place the proceeds in their hands as an indemnity against their liability.



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In the course of three or four weeks, about \$300 was paid to Mr. Kring, and \$100 to witness, which was all paid, or requested to be paid, to the securities.

S. Bynum testified, that there were two jury trials of the issue on the plea in abatement; upon the first trial the defendant read the depositions of about thirty witnesses, besides examining several witnesses in Court, and upon the second trial, he read the depositions of about sixty witnesses; the plaintiff's testimony was not quite as voluminous upon either trial.

Col. Davis testified, that he and Mr. Hayden were counsel for the plaintiffs, in the original attachment suit, and that Mr. Leonard and Mr. Belt were counsel for the defendant; that it was usual in such cases to engage two counsel on a side; that the issue was twice tried, and a good deal of professional labor necessary in the cause; that he and Mr. Hayden charged their client a fee of about \$226, which was ten per cent. on the amount of the debt collected, and he thought Mr. Leonard's professional services in the cause were worth at least \$100.

The plaintiff then read in evidence parts of the depositions of G. Taylor, W. Hendricks and C. Cushing, taken in the State of Indiana; and the deposition of H. M. Cochran, J. Cochran and J. C. Ogden, taken in Platte County, in this State—to which the defendants objected, upon the ground that the matters stated were irrelevant to the issue.

G. Taylor testified, that depositions in the original attachment were taken before him, as a Justice, at Madison, in Indiana, upon two occasions—one at the instance of the defendant, and the other at the instance of the plaintiffs. In the first taking, ten or twelve days were occupied; in the last, six days were occupied. Mr. Sample attended personally with his counsel (Mr. Cushing) every day. Depositions were also taken at Madison in the case before Justice Morelidge, when about a week was consumed on this occasion.

Mr. Hendricks testified, that he attended to the taking of the testimony in Madison, for Faucett, Kelly & Peabody, and that Mr. Cushing attended for Mr. Sample,—that they were engaged twenty days or more in this business, and that the usual counsel fee in such business was \$5 per day.

Mr. Cushing testified, that he attended to the taking of depositions in the case at Madison, before Justices Taylor and Morelidge, and before the Mayor, Park; that Mr. Sample was twice at Madison on this business, and attended every day the depositions were being taken; that

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witness was engaged twenty days, and charged Mr. Sample \$95 for his services.

H. M. Cochran testified, that Sample went twice to Madison to attend to the taking of depositions in the original cause, and once to Plattsburg, in Clinton County, for the same purpose ; that witness was a clerk in Sample's store, in Fayette, when the attachment was levied ; that he was doing a good business at the time, and while the store was closed was paying a heavy rent and other expenses.

Mr. Ogden testified, that Mr. Sample was at Clinton County, in August, 1843, taking depositions in the original cause, and that the expense of traveling from Fayette to Clinton County and back again, would be between \$35 and \$40.

J. Cochran testified, that Mr. Sample was at Madison, taking depositions in the attachment suit, in August, 1842, in January, 1843, and that in October, 1843, witness saw him in the city of Louisville, on his way to Madison, for the third time to attend to the taking of depositions in the original cause.

The plaintiff then introduced Mr. Stapp, who testified that the distance from Fayette to Madison, by water, which he considered the most usual route, was 800 miles, and the cost of going and returning, about \$40 or \$50—and here closed.

The defendant then produced and offered in evidence the depositions in the original suit, to prove the truth of the affidavit, upon which the attachment was issued. This proof was objected to by the plaintiff, and rejected by the Court ; and no further evidence was offered or given.

The plaintiff then asked the Court to instruct the jury as follows :—

1st. In this case it is the duty of the jury to enquire into the truth of the breaches of the bond, assigned in the declaration, and assess the damages occasioned by such breaches, and that these are the only matters submitted to them.

2nd. The jury in the present case are not to enquire whether the original attachment was rightfully sued out, as that matter was settled by the proceedings in the original suit, and cannot be now drawn in question in this suit.

3rd. In estimating the damages sustained by the plaintiff, the jury cannot take into their consideration, in mitigation of the same, that the original plaintiffs, Faucett, Kelly & Peabody, were delayed in the collection of their debt.

Which were severally given and excepted to by the defendants.

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The defendants then asked the Court to instruct the jury as follows:—

1st. They are to disregard, in their retirement, all and every part and parcel of the evidence given by the plaintiff, with reference to the value of the services rendered him by Leonard and Belt, as his attornies in said suit in attachment, so far as the same were rendered by them as attornies in support of the plea in the nature of a plea in abatement, which was read by plaintiff in this cause, and filed by said Sample in said suit.

2nd. That the jury must disregard all the evidence in regard to the taking of depositions by said plaintiff to support his plea, in the nature of a plea in abatement, the time consumed therein, the expenses incurred about the same, and the fees paid counsel and attornies in reference thereto.

3rd. That in this cause the plaintiff is not entitled to recover any damages except what accrued in consequence of the attachment mentioned in the transcript of the record read in evidence by the plaintiff.

4th. That if the jury believe from the evidence that the attachment aforesaid was levied upon the goods of the plaintiff, and that at the time of the levy he had no license to vend goods by retail as a merchant, under the laws of the State, and had no such license until after the goods were released, that then the jury cannot find any damages on account of his being deprived of making sales whilst he had no license.

The Court gave the third instruction, but refused to give the others, to which refusal the defendants excepted.

The jury assessed the plaintiff's damages at \$580, for which he had judgment, after motions for a new trial and in arrest of judgment were overruled. These motions assign the usual grounds in such cases. Thereupon the defendant appealed to this Court, and preserved the foregoing facts in a bill of exceptions.

The questions raised on the demurrer to the declaration, are first in order and will be so considered.

It is contended by the defendant's counsel, that the condition of the bond sued on, does not extend to or embrace the costs, which accrued on the trial of the issue on the plea in abatement. The Supplemental Act of 1837, Session Acts, p. 8, §1, provides that "no attachment shall hereafter be issued, &c., until a bond executed, &c., shall be filed, &c., conditioned that the plaintiff shall prosecute his suit with effect, and without delay, and that he will pay all damages that may accrue to the defendant, or any garnishee, in consequence of the attachment." The

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amendatory act of 1839, Session acts, p. 6, §3, provides that "the bond to be given by the plaintiff shall be executed by him or some responsible person for him, as principal, and one or more securities, resident householders of the County in which the action is to be brought, in a sum of at least double the amount of the demand sworn to, payable to the State of Missouri, conditioned that the plaintiff shall prosecute his action without delay and with effect, and shall pay all damages which may accrue to any defendant or garnishee, by reason of the attachment, *or any process or proceeding in the suit.*" Section 11 of the last recited act declares that "in all cases where the property or effects of any defendant shall be attached, he may file by himself or attorney a plea in the nature of a plea in abatement, without oath, putting in issue the truth of the facts alleged in the affidavit, on which the attachment was sued out."

Because the Legislature at the subsequent session have added to the provision concerning the bond to be executed by the plaintiff, the words "*or any process or proceeding in the suit,*" it is insisted that the bond in this case, is not sufficiently comprehensive to embrace the costs which accrued on the issue framed under the provisions of the 11th section above recited. We are of opinion, however, that these costs may very properly be considered as costs accruing to the defendant "*in consequence of the attachment.*" All the costs of the subsequent proceedings, authorized by the act, may be regarded as a "consequence of the attachment," without the aid of the latter sentence in the 3rd section of the act of 1839; otherwise the defendant could only recover nominal damages, for the mere seizure of his property by the officer, whatever might be the extent of his damages consequent on the proceedings under the attachment.

To give to the condition of the bond, the construction contended for, would circumscribe its operation so as to afford no adequate protection to the defendant.

It is said that the breach assigned in the declaration is too general; whilst it is replied, that although general, it is in the words of the condition, and therefore sufficient. The authorities referred to in support of the breach, appear to sustain the principle, but it is not necessary in this case, to investigate that point, inasmuch as a specific breach is assigned in the count, and the demurrer being to the whole count, was very properly overruled. In 6 Wend. Rep. 458, the Supreme Court of N. York use the following language on this point: "But is the objection to an insufficient breach removed by other breaches that are sufficient in the

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same count of the declaration?" In *Pinkney vs. The Inhabitants of East Hadden*, 2 Saund. 379, it was said by Saunders's counsel, and the Court concurred with him in opinion, that if covenant be brought, and divers breaches are assigned, and some are good and others bad, and the defendant demur to the whole declaration, the plaintiff shall have judgment for those breaches that are well assigned, and shall be barred of the residue. If damages are assessed on the bad breach, he must enter a *remittitur damna*. The same doctrine is recognized in *Orton vs. Butler*, 5 Barn. & Ald. 712; 1 Dowl. & Ryl. 361. If this is the rule to be applied to actions of covenant, it surely must be applicable to debt on bond. If, therefore, the other breach specified in the declaration is well assigned, the plaintiff must have judgment on the demurrer, notwithstanding the defectiveness of the first; but they will be precluded from assessing any damages under that breach.

If, then, the bond covered the costs which were incurred in the trial of the issue on the plea in abatement; and if the demurrer to the declaration was rightfully overruled by the Circuit Court, then the evidence offered and given (but excepted to by the defendants,) on the part of the plaintiff to show the amount of the costs and his expenses incurred in trying that issue, was properly permitted to go to the jury.

Had the defendants the right to enquire into the truth of the issue made upon the plea in abatement, by a re-trial of that issue in this case? If so, then the defendants would have a right to go behind the judgment of the Court, and show that the Court had committed an error either in law or fact, and that the plaintiffs in the former suit should have recovered a judgment, and therefore they were not liable on their bond, for a failure on the part of their principal to prosecute his suit with effect. It would be a novel mode of setting aside, vacating and annulling a judgment. But the truth of the affidavit made, to obtain the attachment, was not in issue here, and could not be put in issue,—the only enquiry in reference thereto, and material in this case, was the fact that an issue had been made, tried and found against the plaintiffs, and that damages had, by reason thereof, accrued to the defendant.

The only remaining enquiry arises on the refusal of the Court to give the fourth instruction asked for by the defendants. The facts are, that the plaintiff was selling goods without license, under a permit from the Sheriff, whose duty it is to grant license—that a few days after he opened his store, the attachment was levied upon his goods, and his store was closed by the officer—during the time his doors were closed by the Sheriff, he did not obtain license, but did so immediately after he re-



*Gentry vs. Woodson.*

commenced selling, and the license was ante-dated, so as to cover the whole time he had been engaged in business. This practice prevailed in Howard County. In all this, we see no sufficient reason to withhold from the plaintiff his right to recover damages in this action,—the fault, if any existed, was the Sheriff's, and not his—he had done what was necessary on his part,—made his application to the officer empowered to grant the license, who from some cause failed to grant the license, and told him to proceed and sell. This permit might not avail the party, if the State should complain.

From a review of the whole case, we cannot say that the damages assessed by the jury are excessive.

The other Judges concurring herein, the judgment of the Circuit Court is affirmed.

GENTRY vs. WOODSON.

On a petition for dower, although the widow will not be held to strict proof of title in the husband, to make out a *prima facie* right, yet upon a plea of *non seisin*, she must either shew title in the husband, actual possession, or that defendant holds under the husband.

APPEAL from Boone Circuit Court.

TODD *for Appellant.*

GORDEN & LEONARD *for Appellee.*

1st. The proof given, consisting exclusively of the deed of November, 1818, and the partition deed of September, 1821, did not maintain the issue on the part of the plaintiff, and therefore the instruction asked was properly given.

2d. The chain of title offered in evidence by the plaintiff, consisting of the five deeds, was properly excluded on the ground that two of the deeds, embraced in the chain, had been executed under powers of attorney, which were neither produced nor offered in evidence.

3d. The rejected evidence was offered too late. After the proof was closed on both sides, it was in the discretion of the Court to allow or refuse to allow the case to be opened, and fresh evidence given; and it does not appear that the Circuit Court improperly exercised this discretion, and unless it does so appear from the record this Court will not reverse the judgment. *Frederick and others vs. Gray*, 10 Searg. & Rawl. 182; *Jackson vs. Talmadge*, 4 Cowen R. 450; *George vs. Bradford*, 14 Eng. Com. Law Rep. 391.

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*Gentry vs. Woodson.*

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NAPTON, J., *delivered the opinion of the Court.*

This was a petition for dower in lot number seven, in the town of Columbia. The defendant, among other pleas, pleaded *non seisin* in the husband. On the trial of this issue, the plaintiff gave in evidence a deed, dated 14th Nov., 1818, from Anderson Woods and others to Thomas Duley and others, conveying the tract of land upon which the lot in controversy is situated, in trust, to lay out a town thereon, and dispose of the lots for the benefit of the proprietors, of whom Richard Gentry was one. The plaintiff also gave in evidence a deed of partition among the proprietors of said tract, dated Sept. 3, 1821, of the undisposed lots in the town of Columbia, and by this deed lot number seven was assigned to Richard Gentry as a portion of his share. The plaintiff also proved her marriage with the said Richard Gentry previous to 1821, and his death in 1837, and here closed her case. Thereupon, the defendant having no evidence to offer, prayed the Court to instruct the jury, that upon the evidence submitted the issue of *non seisin* could not be found for the plaintiff. Whilst this motion was under advisement, the Court seeming inclined to overrule it, as the bill of exceptions states, the plaintiff proceeded to offer in evidence copies of five deeds, constituting a chain of title from Richard Gentry to the defendant, with proof of the defendant's possession of the lot at the commencement of this suit. Two of these deeds were executed by powers of attorney, but the instruments by which these powers were created were not produced. This evidence was rejected by the Court, and upon the Court's expressing an opinion that the plaintiff could not recover upon the evidence submitted, she took a non-suit, and afterwards moved to set it aside. This motion being overruled, the case was brought here by appeal.

The books do not define with much precision the amount or character of the testimony which will suffice to make out a *prima facie* case for the plaintiff, in an action of dower, under the issue of *non seisin*. There is no doubt but that an actual corporeal *seisin*, or a *right* to make such *seisin* in the husband during the coverture, is essential to entitle the widow to dower. It also seems very reasonable, and has accordingly been so adjudged, that the widow shall not be held to strict proof of her husband's title. She is not, by law, the keeper of her husband's title papers, and has, therefore, never been compelled to offer more than the slightest or lowest order of evidence. Possession under a claim of title has usually been the character of the proof in such cases, and such proof has been held sufficient. *Bancroft and wife vs. White*, 1 Caine's R. 185;

*Gentry vs. Garth.*

Hitchcock and wife vs. Carpenter, 9 J. R. 341; Embree vs. Ellis, 2 J. R. 122; Dolf vs. Bassett, 15 John. R. 21. So also proof that defendant is in possession under the husband, directly or indirectly, has been held sufficient evidence of the husband's *seisin*. Plantt vs. Payne, 3 Bayly S. C. Rep. 319; Collins vs. Toney, 7 J. R. 182.

The proof offered in the present case, if we exclude that which the Circuit Court excluded, and which was offered after the plaintiff had closed her case, does not seem to come up to the requisitions recognized in any of the recited cases. There was no attempt to prove any possession, nor was any title shown which could give a legal *seisin*. A deed from persons professing to be proprietors of a large tract of land to trustees, for the purpose of laying out a town, and a subsequent deed of partition among these proprietors, could not establish a *seisin* in the husband, unless the title of these grantors was shown, or a possession of some sort established, which would have been presumptive evidence of title.

In relation to the evidence introduced subsequently to the close of the case, and after instructions had been moved for by the opposite party, it is unnecessary to add any thing to the general principles heretofore established by this Court, relative to the introduction of testimony out of order. The application of these principles to the present case becomes entirely immaterial, inasmuch as the title papers thus excluded were defective, and could have availed nothing had they been presented in time. The other Judges concurring, the judgment of non-suit is affirmed.

## GENTRY vs. GARTH.

The certificate of a recorder, annexed to a paper purporting to be the copy of a deed, and of the certificate of acknowledgement of the same, that "the foregoing is a true copy of a deed on record in his office," does not authorize the deed to be read in evidence. The certificate should also certify to the correctness of the copy of the certificate of acknowledgement.

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*Gentry vs. Garth.*

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## APPEAL from Boone Circuit Court.

*TODD for Appellant.*

1st. That in pleading the defendant has admitted possession of the premises, in which dower is claimed, at the commencement of the action, and admits the holding under title stated in the petition—the law will presume where title is stated and possession had, that they are united.

2d. The defendant, holding derivative title, is presumed in possession of the evidence of such title, and where title is in contest is bound to produce them. *Starkie on Evidence in Dower.*

3d. The defendant, holding such title, is estopped from denying the recitals stated in the title deeds; hence in this case he could not deny the derivation of title from Tarlton Turner, as recited in the deed of Richard to Reubin E. Gentry. 3 Phil. 1235.

4th. The petitioner for dower is not bound to prove title by the title papers, not in law having possession of them. *Starkie as above.*

5th. The copy of deed from Turner to Gentry is sufficiently and substantially certified under the statute. If not, it was substantial evidence against this defendant to corroborate the recital in Gentry's deed, and entitled to weight before the jury of the existence of an original. 3 Phil. 1240.

*GORDON & LEONARD, for Appellee, insist:*

1st. The recorder's certificate, appended to the copy of Turner's deed of February, 1820, did not embrace the alleged copy of the certificate of acknowledgment endorsed upon the deed—and, therefore, the copy of deed was not authenticated in such a manner as to entitle it to go in evidence under the 19th section of the act entitled "Evidence," which is the only provision of the statute applicable to the case.

2d. Admitting that Turner's deed was improperly excluded, the judgment will not be reversed, because that deed together with the other evidence before the jury would not have entitled the plaintiff to a verdict, and therefore its exclusion has not injured the plaintiff.

*NAPTON, J., delivered the opinion of the Court.*

This was a petition for dower by the widow of Richard Gentry, in lot No. 33, in the town of Columbia. The plea of *non seisin* in the husband was pleaded by the defendant, Garth. Upon the trial of this issue, the plaintiff gave in evidence a patent from the United States to Tarlton Turner, for the quarter section of land upon which the lot is situated, and two deeds of conveyance, one dated the 14th November, 1818, from Richard Gentry, Tarlton Turner, and others, to Thomas Duley and others, conveying to them several tracts of land, including the one patented to Turner, in trust, to lay out a town thereon, and dispose of the lots for the benefit of the proprietors. The other was a deed of partition among

Gentry vs. Garth.

the proprietors, dated 3d of July, 1821, by which deed the lot in controversy was assigned to Tarlton Turner. The plaintiff also proved that she was married to Richard Gentry prior to the month of January, 1820, and that her husband died in 1837, and that the defendant was in possession of the lot No. 37, at the commencement of this suit.

The plaintiff then gave in evidence an instrument of writing, purporting to be the copy of a conveyance of the 16th Feb'y, 1820, from Tarlton Turner to Richard Gentry, conveying to him all his interest in the property embraced in the deed of trust of the 14th Nov., 1818. This writing also contained what purported to be a copy of the acknowledgment of the execution of the deed by the grantor, made before the clerk of the Circuit Court, on the same day it was executed, and of a certificate of the registry of the deed in Howard county, on the day of the acknowledgment. Appended to the writing was the official certificate of the clerk of the Howard Circuit Court, that the same was "a true and perfect copy of a deed from Tarlton Turner to Richard Gentry, then on record in his office."

The plaintiff then offered in evidence three deeds of conveyance of the lot in question, one of the 9th January, 1821, from Richard Gentry to Reubin Gentry, one of the 1st August, 1822, from Reubin Gentry to Wm. Jewell, and one of the 1st November, 1836, from Wm. Jewell to the defendant.

Upon the motion of the defendant, the Court excluded the copy of Turner's deed, of February, 1820, to Richard Gentry, and thereupon the plaintiff suffered a non-suit. Afterwards she moved that the same be set aside, which being overruled, an appeal was taken to this Court.

The only point we are called upon to decide in this case is the propriety of the action of the Circuit Court in excluding the copy of Turner's deed. In consequence of this expressed opinion of the Court, the plaintiff submitted to the non-suit.

We are not, therefore, called upon to say whether the proof of Garth's possession and derivative title, from Gentry, did not of itself make out a *prima facie* case. The Circuit Court gave no opinion on this point, because none was asked, and the plaintiff voluntarily placed the case upon the single point of Turner's deed. Upon this point we see no reason to question the propriety of the Court's opinion. The copy of Turner's deed was alone admissible under the provisions of our statute, concerning evidence, and these provisions expressly require the clerk to certify not only a copy of the recorded deed, but of the certificate of acknowledgment thereof—and this the clerk of the Howard Circuit

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*Walcop & Griswold vs. McKinney's heirs.*

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Court has not done in the present instance. Rev. Code 1845, page 470 §19.

The other Judges concurring, the judgment of the non-suit must be affirmed.

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WALCOP & GRISWOLD vs. MCKINNEY'S HEIRS.

A mortgagee may maintain an action of ejectment against the mortgagor, or those claiming under him.

APPEAL from Warren Circuit Court.

CAMPBELL *for Appellants.*

BIRD, *for Appellees.*

McBRIDE, J., *delivered the opinion of the Court.*

Alexander McKinney's widow and heirs instituted an action of ejectment in the Circuit Court of Warren county, to recover possession of a tract of land situated in said county, and described as a "certain tract or parcel of land, situate on Lake creek, containing thirty-eight acres, more or less, in Charette township, in Warren county, and the same tract conveyed by Andrew Cockran to William F. Bentinck, and the same conveyed by said Bentinck to Alexander McKinney, as will more particularly appear by reference to the record of conveyances from said Cockran to Bentinck, and from said Bentinck to said McKinney, found in the office of the recorder of the said county of Warren." The defendant, Walcop, being the tenant in possession, and not claiming title, the defendant, Griswold, was on motion permitted to be made co-defendant and they thereupon filed their plea of not guilty, on which issue having been taken, the parties went to trial, when the jury found the defendants not guilty, whereupon the plaintiffs filed their motion for a new trial, which was sustained by the Court, and a new trial granted.

On the second trial the jury found "the defendants guilty of withholding from the plaintiffs the possession of the premises, as is alleged in said

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*Walcop & Griswold vs. McKinney's heirs.*

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plaintiff's declaration," on which the Court entered judgment; thereupon the plaintiffs filed their motion in arrest of judgment, and for a new trial, which being overruled they excepted, and have brought the case here by appeal.

The bill of exceptions sets out the proceedings had on the trial in the Circuit Court, with the evidence given on the trial, and that offered by the defendants, and excluded by the Court, from all of which it appears that the parties each claim title under Wm. F. Bentinck; who had purchased the land in controversy from one Andrew Cockran. Bentinck, on the 24th January, 1838, mortgaged the premises to Alexander McKinney. On the 23d October, 1838, Griswold obtained a judgment in the Warren Circuit Court against Bentinck; on the 25th January, 1840, he obtained four other judgments before a justice of the peace, and filed transcripts of the same in the clerk's office of the Warren Circuit Court. On the 31st July, 1840, Bentinck conveyed by deed to McKinney, who at the same time executed a defeasance bond, binding himself to reconvey, provided Bentinck should, within two years, pay him the amount of his debt with the accruing interest. On the 24th Nov., 1840, the sheriff, by virtue of Griswold's executions, sold the land in controversy, and Griswold became the purchaser, and obtained a deed from the sheriff.

The counsel for the appellants assume that the deed under which the appellees claim to have title, although absolute on its face, was intended by the parties as a mortgage, and being so intended it will be taken and treated as such by the Court. Having thus determined the character of the deed, it is then argued that a mortgage, under our statute, is a simple security for a debt, and does not, as in England, pass such a title as will enable the mortgagee to maintain an action of ejectment.

There is no question but that our statute has greatly changed the character of mortgages, and the rights of parties under them, but still the authority referred to does not sustain the doctrine contended for by the counsel. In the case referred to, in 1 J. J. Marsh 257, are stated some of the principles which characterize mortgages in this country at the present time; as that a payment of the mortgage debt extinguishes the mortgage at law as well as in equity. The mortgage is but a chattel interest. The right to the money passes to the personal representative of the mortgagee, and his receipt of the debt is good against the heir. The wife of the mortgagor is dowable, and of the mortgagee is not, even after forfeiture. The estate mortgaged may be sold to pay the mortgagor's debts, but not for the debt of the mortgagee. The debt cannot be separated from the mortgage. The mortgagee, after forfeiture, may maintain

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*Walcop & Griswold vs. McKinney's heirs.*


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an ejectment against the mortgagor, to recover the estate mortgaged, *that he may have the benefit of the profits*. But the legal title *pro forma* is vested in the mortgagee, after forfeiture, *for the sole purpose of securing his debt*. He cannot sell or assign the estate without parting with the debt; and it seems to result necessarily, that by an extinguishment of the debt, *ipso facto*, the perfect legal title relapses to the mortgagor; it is not doubted that a payment, before forfeiture, extinguishes the mortgage at law. But there are many learned judges who doubt whether a payment, after forfeiture, will have the same effect. On this point there is great diversity in the cases reported, as well as in the "*auctoritas prudentium*." But ever since the days of Hardwick, the opinion has grown more and more prevalent, that a payment at any time before the title has passed to the mortgagee, by a decree or sale, will, *per se*, at law, as it will in equity, divest the mortgagee of all title. To support the foregoing propositions, the Courts in Kentucky refer to 4 John. R. 42-3; 2 Burr 969; Douglass 630; ib. 455; 6 John. R. 294; 7 ib. 278; 10 ib. 381; 7 Mass. R. 139; 5 John. Ch. R. 454, 552, 570; Fuller 185-6; Powell on Mort. 683.

The books all hold the doctrine that after the day of payment as stipulated in the mortgage deed, the legal title is in the mortgagee, and he can only be divested of that title in one of two ways—either by payment of the debt, when the title will revert to the mortgagor; or by a sale of the mortgaged premises, when the title passes to and vests in the purchaser.

But it is not deemed necessary to prosecute the investigation of this point further, at this time, and to show, if it were practicable to do so, the necessity of holding fast to the shadow after the substance had vanished; inasmuch as the plaintiffs, in the Court below, claim to have derived title by an absolute deed from Bentinck, under whom the defendants likewise claim title. If the deed was intended as a mortgage, merely to secure the payment of a debt, and Griswold, as one of the creditors of Bentinck, wished to redeem: or if the deed was fraudulently made to defeat *bona fide* creditors, there is a forum in this country fully competent to investigate the subject and to do full, complete and ample justice in the premises, and to that tribunal we must turn over the parties.

In ejectment the general rule is, that the plaintiff must recover upon a legal title in himself, and not because his adversary may have no title, and so far is this idea carried that a practice once existing, of not permitting the legal estate to be set up at law, by a trustee, against his *cestui qui trust*, is no longer countenanced in England. 2 Term R. 684;

*Grove vs. The State.*

7 ib. 47; 8 ib. 122; 1 ib. 759. The Courts think it better to keep the jurisdiction herein separate and distinct, lest confusion might eventually be introduced, by inquiries in a Court of law, into complicated equities. Tucker's Notes, book 3, p. 177.

The assignment of Cockran's title bond to Griswold, by Bentinck, would, at most, only raise an equity, and could not prevail at law against one holding by deed under Bentinck, after he had acquired a deed from Cockran. The same may be said of the sheriff's deed, made after the deed made by Bentinck to McKinney, and which was excluded as evidence by the Circuit Court. This deed, if it were unobjectionable in every particular, could not pass the title of Bentinck to Griswold, for if he had any at the date of the deed it was a mere equity, and could not, therefore, be set up as a defence in this action.

Prior to the execution of the deed from Bentinck to McKinney, of 31st July, 1840, Griswold obtained several judgments against Bentinck; one in the Circuit Court on the 23d October, 1838, and four other judgments before justices of the peace, and had filed in the clerk's office of the Circuit Court of Warren county, transcripts of said judgments, which created liens on the real estate of Bentinck; upon those judgments executions were issued, and the land in controversy was sold by the sheriff and purchased by Griswold. These facts, however, do not possess Griswold with the legal estate, or any other title which would avail him as a legal defence in this action. He was, therefore, not injured by the refusal of the Circuit Court to permit him to give them in evidence.

For the foregoing reasons, we are of opinion that the Circuit Court committed no error, and the other Judges concurring, the judgment of the Circuit Court of Warren county is affirmed.

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GROVE vs. THE STATE.

In an indictment for inhumanly beating a slave, it is not necessary to set forth the name of the owner of the slave.

ERROR to the Chariton Circuit Court.

DAVIS *for Plaintiff*.

The only question presented is as to the sufficiency of the indictment.

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*Grove vs. The State.*

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The indictment does not charge that any person is the owner of the slave, and there is no such thing as a person being in slavery without an owner or a master. See 1 Chitty's Criminal Law, 213—214. See 3 do. 1087, forms of indictments for killing, wounding or poisoning stock, &c.

The record shows a motion to quash was overruled.

STRINGFELLOW, Attorney General, *for the State.*

NAPTON, J., *delivered the opinion of the Court.*

This was an indictment under our statute which prohibits cruel or inhuman treatment of slaves by the individual having the charge or control of such slave. The indictment is sufficiently specific in the description of the slave, and of the offence, but it is objected that it omits to state the name of the person to whom the slave belonged. The statute declares that whoever abuses a slave inhumanly, whether that slave be his property or the property of another, provided the slave be in his employment, shall be punished by fine and imprisonment, or by either, in the discretion of the jury. (Rev. C. 1845, p. 406.) By the common law it was necessary to insert the name of the owner of personal property, which had been stolen, provided the owner was known, because he was the *party injured*, and restitution would be ordered if the goods were found. The provision of our statute under which this defendant was indicted, evidently treats the slave as the party injured, and not his owner; for by the common law, supposing larceny to afford a parallel case, a man could not be guilty of stealing his own goods, and therefore it was necessary to allege a third person as the owner: but in the offence set forth in this indictment, it made no difference whether the slave belonged to the defendant or to a third person. No redress was intended to be afforded to the owner, where the defendant was not the owner, but the owner was left to those civil remedies which were already provided him, and the statute punishes the offence. *Cui bono* then insert the name of the owner? It could answer no useful purpose whatever, unless to designate with greater certainty the person of the injured slave, and this may be done as well by a description of his name, sex, &c., as was done in this indictment.

The judgment affirmed.

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*Jewett vs. Weaver, Adm'r of Horn.*

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## JEWETT VS. WEAVER, ADM'R OF HORN.

A right of action against a Sheriff for a false return on an execution, survives against his administrators.

## ERROR to Green Circuit Court.

RICHARDSON & OTTER, *for Plaintiff, insist:*

- 1st. The County Court has jurisdiction. See Revised Statutes, page 92.
- 2nd. The cause of action survives against the administrator under our statute. See Statute, page 76.
- 3rd. The cause of action exhibited is sufficient.

HENDRICKS, *for Defendant.*

NAPTON, J., *delivered the opinion of the Court.*

This was a demand originally presented to the County Court of Green County against the estate of Thomas Horn. The written statement which was filed in the County Court, set forth in substance the following facts as the foundation of the action: An execution was issued from the Green Circuit Court, in which Jewett was the plaintiff, and one Payne defendant, which execution commanded the Sheriff of that County to levy upon the goods and chattels, lands and tenements of said Payne, the sum specified therein, and in the event that property could not be found, to take the body of the said Payne, &c. This execution was returned by Horn, the then Sheriff, to whom it had been directed, with the statement that said Payne could not be found in Green County. This return the plaintiff alleged to be false, and asserted that Payne, whilst the execution was in the hands of said Horn, during the life-time of said Horn, was openly and publicly in the County of Green, and could have been arrested. By reason of this false return, the plaintiff claims from Horn's executor the amount of the execution.

The County Court refused to audit and allow this demand, for reasons which do not appear in the record. The case was removed by appeal to the Circuit Court, where the defendant, Weaver, moved the Court to dismiss the cause for the following reasons:—*First*, because the County

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*Thomas vs. The State.*


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Court had no jurisdiction of said case. *Second*, because the cause of action set forth by the plaintiff, died with the said Horn; and, *lastly*, because the cause of action was not sufficiently set forth. This motion was sustained and the cause dismissed.

We presume the only question in this case which could be considered a debateable one, is the one arising out of the second objection urged in the defendant's motion to dismiss. This question is, whether the present action is one which died with the person, or would survive against the personal representatives. This subject was fully considered by this Court in the case of *Higgins vs. Breen*, adm'r of *McNally*, 9 Mo. R. 499; and it is unnecessary to repeat what was then said. If the cause of action be admitted to be one which survived against the estate of Horn, there would seem to be no ground for disputing the jurisdiction of the County Court. The provisions of our statute which define the jurisdiction of this tribunal, are so explicit as to leave no room for doubt. As to the insufficiency of the plaintiff's statement, we have not been able to perceive any, and it has not been stated in what particular it is deficient.

The other Judges concurring, the judgment of the Circuit Court will be reversed, and the cause remanded.

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AMOS THOMAS vs. THE STATE OF MISSOURI.

An appeal from the judgment of a Justice on a conviction for an assault and battery, must be perfected on the day of trial.

APPEAL from Chariton Circuit Court.

CLARK, for Appellant, contends:

That the Circuit Court erred in refusing to grant the rule upon the Justice, upon the application of Thomas;—the affidavit showed the Justice had not made a correct return, and the only way to correct it was by rule. The errors in the record of the Justice are set out in the motion, and sworn to by the appellant. It is also contended that the Court ought to have permitted the appellant to file a new bond and affidavit after the Court refused the rule upon the Justice. *Rev. Statutes of 1835*, p. 374. 4th Mo. Rep. 28. *Jones vs. Davis*.

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*Thomas vs. The State.*

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STRINGFELLOW, Attorney General, *for the State.*

1st. The affidavit and recognizance of the defendant, made before the Justice, are insufficient. See Rev. Code, 1835.

2nd. The appeal was not taken and perfected on the day on which judgment was rendered. Cox vs. State. 9th Mo. Rep. 181.

3rd. The Circuit Court had no power to permit a new recognizance and affidavit to be filed in that Court. Cox vs. State. 9th Mo. Rep. 181. Stat. 1835.

McBRIDE, J., *delivered the opinion of the Court.*

This was a prosecution commenced before a Justice of the Peace in Chariton County, on the 8th October, 1844, against the defendant for an assault and battery, committed on the person of one Humphrey Adams. A trial was had on the 10th of the month before a jury, when the defendant was found guilty, and a fine of \$50 was assessed against him, on which the Justice rendered judgment. On the same day the defendant asked for an appeal to the Circuit Court, and tendered his bond, which being adjudged insufficient by the Justice, was rejected. On the next day the defendant tendered another bond, which being approved of by the Justice, an appeal was granted to the Circuit Court.

In the Circuit Court, at the May Term, 1845, the Circuit Attorney filed his motion for an affirmance of the judgment of the Justice, for the reason (among others,) "because the appeal was not taken and perfected on the day of the rendition of the judgment by the Justice."

Before a disposition of the motion, the defendant filed an affidavit and motion, praying for a rule against the Justice, to show cause why he should not amend his return, in conformity with the facts, as they occurred on the trial. The statement in the affidavit is, that on the day of the trial before the Justice, and after the rejection of the first recognizance bond offered by the defendant, the Justice informed him, that all further proceedings in the cause would be suspended until the next day.

The Circuit Court overruled the defendant's motion for a rule against the Justice, and sustained the motion of the Circuit Attorney for an affirmance of the judgment;—thereupon the defendant appealed to this Court.

The defendant's attorney relies upon the right of the defendant to give his appeal bond on the day after the trial, or, to perfect his appeal by giving his bond, in the Circuit Court.

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*Wells vs. Thomas & Martin.*

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These two questions have been considered and determined by this Court in the case of *Cox vs. The State*, 9 Mo. R. 181.

The judgment of the Circuit Court is affirmed.

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WELLS vs. THOMAS & MARTIN.

A fraudulent sale set aside.

APPEAL from Platte Circuit Court, (in Chancery.)

STRINGFELLOW, for *Appellant*, insists:

That the only evidence relied on to shew fraud, being the evidence as to the insufficiency of the consideration—that evidence was not such as to shew fraud. The defendant, Hamilton, had nothing until Wells advanced the money and purchased the land. He then had but eighty acres, for which he might be well content to take the improvement bought by Wells. There is no evidence to contradict the answer, which states that this was in good faith, and not to defraud any person.

The transfer was made before the judgments were rendered—indeed a few days after the suit was brought.

The defendant, Hamilton, prior to the entry, had no interest which could be subject to payment of debts, and had he refused to enter, and permitted Wells to enter, it would have been no fraud upon his creditors.

The alleged inadequacy of price does not render the conveyance fraudulent.

TODD, for *Appellees*, insists:

1st. That the facts prove a collusive sale, by Hamilton to Wells, of the land to defraud creditors.

2d. The consideration is greatly inadequate for the land.

3d. It was conveyed without any certain contract, but to cover it from creditors, until the parties could arrange the mode and manner of payment.

4th. The facts prove that Wells, knowing the indebtedness of Hamilton, colluded to protect the property, and finally obtained it for a trifling consideration, and Hamilton, nor his creditors, obtained any benefit from the Yocum claim.

McBRIDE, J., delivered the opinion of the Court.

The complainants filed their bill in the Platte Circuit Court against the defendants, in which they alleged that on the 6th February, 1844, they

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*Wells vs. Thomas & Martin.*

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obtained a judgment against Hamilton, before a justice of the peace in said county, for about \$41, together with costs; and that the complainant, Martin, is beneficially interested in a judgment obtained against said Hamilton, in favor of Wilson & Baldwin, likewise obtained before a justice of the peace in said county, on the 4th March, 1844. That executions were regularly issued on the said judgments—placed in the hands of a constable, and by him returned “no property found,” but he summoned the defendant, Wells, as garnishee, who answered under oath that he was in no wise indebted to his co-defendant, Hamilton.

That at the time of the commencement of the suits aforesaid against Hamilton, which was in the fall of 1843, the said Hamilton had a pre-emption on the north east quarter of section 27, township 53, range 35, situate in said county, and worth about \$800. That the defendant, Wells, agreed with Hamilton to furnish \$200, to enter the quarter section, provided Hamilton would convey to him the north half as soon as entered. That a short time prior to the rendition of the judgments against Hamilton, the agreement was consummated, and the land entered at the land office in the name of Hamilton, and immediately thereupon the certificate of entry, for the whole quarter section, was conveyed by assignment to Wells, fraudulently and without any valuable consideration, and for the purpose of preventing the said land from being sold to satisfy the debts of Hamilton. That Hamilton was largely indebted to other persons, and had no other estate out of which creditors could make their demands—that Wells was a near neighbor and fully apprised of his insolvency, and knew, at the time of transfer to him, that the complainants had instituted suits for the recovery of their demands, and at what time judgments would be rendered thereon.

That a few days before the entry of the land, by Hamilton, the complainants had a conversation with Wells about their claims, and the land and that Wells then told them that he was about buying the remaining 8 acres of Hamilton, and if he done so, he would retain in his hands an amount sufficient to pay their debts. That the transfer of the 80 acres afterwards made, was without consideration, or, if any thing was paid, it was done merely to give the semblance of fairness to the transaction that the said 80 acres was worth, at the time, at least \$350 or \$400.

That transcripts of the judgments aforesaid were regularly filed in the clerk's office of the Platte Circuit Court, and that executions were issued thereon by the clerk, and levied by the sheriff on the land in question, which having been sold, was purchased by the complainants for the sum of five dollars, and a deed executed accordingly.



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*Wells vs. Thomas & Martin.*

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The bill concludes with a prayer that the defendant, Wells, may be compelled to convey the half quarter section of land to the complainants; or so much thereof as shall be necessary to satisfy their demands against Hamilton; and for general relief.

Thos. Hamilton answered, admitting his indebtedness as charged in the bill. That he was entitled to the right of pre-emption on the quarter section described in the bill, but being unable to enter the land himself, he made an agreement with his co-defendant, Wells, by which Wells was to furnish \$200, to make the entry, and to have one half of the land. That in conformity with said agreement, he went to the land office and made the necessary proof, when Wells furnished the \$200, and the land was entered accordingly in his, Hamilton's, name. That the entry was made on the 30th October, 1843, and the certificate of entry for the whole quarter section was assigned to Wells on the same day—but before the west eighty acres was transferred, and as a valuable consideration therefor, Wells agreed to purchase for him a claim held by Mathias Yocum, on public land, and which he subsequently did obtain for the sum of \$75. That he considers the exchange a good one, not only for himself, but for his creditors, as the claim is of equal value to the 80 acres which he sold Wells. He tendered to the complainants his interest in the entire quarter section of land for \$300; admits his inability to pay his debts; denies fraud, &c.

Charles Wells answered, admitting the judgments against Hamilton, and that he was garnisheed—that he answered then, and answers now, that he owed Hamilton nothing. Hamilton was entitled to the right of pre-emption in the quarter section described in the bill, in the fall of 1843, when the complainants commenced their suits against him, but denies that these judgments operated as a lien on the land, after the entry, inasmuch as he purchased prior to their rendition. The land was worth at the date of the entry \$800—it was entered with his money, under an agreement with Hamilton, that he should have one half of the land for furnishing the entrance money for the whole. The entry was made on the 30th October, 1843, and the certificate was on that day assigned to him, by Hamilton, for the entire quarter section—that for the west half of the quarter section he agreed to purchase for Hamilton a claim of M. Yocum, which Hamilton said was worth as much as the entire quarter section which he had just entered. This claim he subsequently obtained and put Hamilton in possession, where he now resides.

The answer denies a knowledge, on the part of the respondent, of Hamilton's general indebtedness, but admits that he knew of the debts of

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the complainants, and a demand due to Geo. P. Dorris—he admits a conversation with the complainants, prior to his purchase, concerning the complainants' debts against Hamilton, and his purchase of the land, but denies ever having promised to hold the amount in his hands to satisfy these debts—he spoke to Hamilton concerning them, and Hamilton said he would see the complainants himself, and see if he could not get them to make a discount—denies a knowledge of suit having been commenced when he purchased of Hamilton, but supposed that he had paid the complainants, or made arrangements to that effect. He admits possession of the land, and that he has and still refuses to give possession, or convey any part, to the complainants—he also refused to pay the judgments or any part, not conceiving himself bound, either in law or equity, to do so. He may have talked about giving Hamilton's children something, but never did unconditionally promise to do so—in the event of his not getting the Yocum claim, he intended to give the children a part of the value of the land. He denies all fraud, &c.

Exceptions having been taken to the answer, and sustained, the defendant filed an amended answer, in which he states that although he lived within one mile of Hamilton, he was not intimately acquainted with him, and knew nothing of his embarrassment—that he had formed no opinion as to his solvency, either before or at the time of their trade—that about the 18th or 20th Nov., 1843, Hamilton apprised him that Yocum had a claim which he desired to sell, and if he would purchase that claim, he (Hamilton) would take it in the place of the west half quarter which he had assigned to defendant. That in a day or two he went and purchased the claim of Yocum for \$75, Yocum saying he had another claim, and would take that sum, although the claim was worth two or three hundred dollars.

A general replication was filed to the answers, when the parties went to trial on the bill, answers, exhibits, and evidence, and the Court decreed in favor of the complainants. The defendants filed their motion to set aside the decree, which being overruled by the Court, they excepted, and have brought the case here by appeal.

The bill of exceptions shows the following to have been the testimony: Mathias Yocum testified, that Hamilton told him at Martin's mill, if he liked his claim he would give him \$75 for it, in trade, that being the price he asked for the claim—Hamilton went to see the claim, and said he liked it better than he expected, and that he would buy it if he could get a certain man to help him. A few days afterwards, Hamilton, Wells, and another man, came down and brought a horse, which Wells said he would

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give Hamilton, to assist in buying, and valued the horse at \$40, which price he agreed to allow—Wells also said he had a rifle gun at home, worth \$25, which he would let him have on the contract, and he went to Wells' house in a few days, and took the gun at \$25—Wells also offered to give him other property, but he did not like the price, and said he would get the balance of the pay from Hamilton, and went over to his house, when he paid him a cow and two calves, valued at \$10, which made up the sum of \$75, the price agreed on for the land between him and Hamilton, for the claim. The claim consisted of a fraction of a claim, of between 30 and 40 acres, situate in Green's bottom, on Bee creek; attached to it was the privilege of taking witness's interest in rails lying across Bee creek, on government land. Witness only sold his interest in the fraction above named—he would rather have had \$50 in cash, than what he got for the claim—the land was good rich land, and he could have got \$150 for his claim before the flood, which overflowed it—the fraction was all he claimed, and all he sold, but at the same time he told Hamilton he could have all the privileges he had over Bee creek, where he had enclosed about 20 acres, but the flood had washed down all the rails—Hamilton said he was satisfied on this side of the creek. On the fraction were enclosed five or six acres, a cabin, corn-crib and stable—he also stated to Hamilton he could have all his interest over the creek, and if he could cross the creek and make out a full quarter, he could do so. He sold all the claim which he had there, and no more—the claim consisted of between 30 and 40 acres of surveyed land on this side of Bee creek, with an improvement of 6 to 8 acres of fenced and cultivated land, cabin and stable, and some 18 to 20 acres of enclosed land on the other side of Bee creek, which was on unsurveyed land, and the fencing of which had been washed down, but the rails were on the ground, about 5000 rails—his claim over there consisted of just as much land, as he might be able to hold with his fraction on this side after it should be surveyed—he gave \$120 for it—he sold to Hamilton no more than he could hold by law, and Hamilton run the risk as he done when he purchased.

William Yocum states that his brother sold to Wells or Hamilton, his claim in the Missouri bottom, for, as he understood, \$75 in trade—the claim consisted of a fraction of about 33 acres of surveyed land, on Bee creek, south side, with an improvement of 6 or 8 acres on the fraction, a cabin and stable, also 18 or 20 acres of land under fence, which had been washed down with the flood, on the north side of the creek, and on unsurveyed public lands, with whatever of claim Mathias Yocum had

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there—he did not think the claim was worth more than \$20 dollars, although his brother gave \$120 for it—the land was good, but had been overflowed, and was now of much less value since the flood than before—the sale took place since the flood of 1843—the land was public land.

Brookenberry Frazier states that he purchased the claim from Hamilton, after the flood of 1844, for the sum of \$15—that he looked on the claim as of trifling value since the overflows—there was not over 8 or 10 acres of improved land on the north side of Bee creek—the fences were washed down, and whether all the rails were there or not he did not know—he thought \$50 would have been a big price for it at the time Yocum sold to Hamilton—the fraction of 33 acres was all that was entered—Hamilton moved to this place in February or March, 1844.

John R. Owen states that Wells, in a conversation with him, told him that he had promised James S. Thomas, to pay him the \$40 debt due from Hamilton and Poe to White, which was for the benefit of Thomas, which is the debt in the bill mentioned. That in relation to the Wilson and Baldwin debt, which was for the benefit of complainant, Martin, Wells told him that Martin had better not have proceeded so soon against him by garnishment, as he would have some money for the benefit of Hamilton's children, after a while, or when he sold the land—that he did not know of the indebtedness of Hamilton to any one except the debts spoken of above—at that time he lived about one mile and a half from him—witness had two conversations with Wells, in both he promised to pay the Thomas debt—in the first, Martin sent him to see Wells, and see whether he would make any arrangement to secure that debt—the first conversation was in the fall or winter of 1843, the second in the winter of 1843-4—Wells stated, in speaking of the garnishment, that Martin would have done better not to have proceeded against him, as he did not owe Hamilton any thing, but would owe his children something—said the west 80 was worth some \$400, and the whole quarter from \$800 to \$1000—the east half was most valuable—Hamilton was poor and unable to pay his debts, having nothing but this claim.

George P. Dorris states that in December, 1842, he sued Hamilton for the sum of about \$60, that he run his execution against him, and could make nothing—that it run on until lately—Hamilton had given him a horse in discharge of his debt—he did not know of any other indebtedness of Hamilton.

John Wilson states that he had a conversation with Wells in Plattsburg, about the debt from Hamilton to him and Baldwin—that he had heard that Wells was about purchasing the claim of Hamilton, and thought his only

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chance to make their debt, was to get it out of that property, as he knew of no other property that Hamilton had. The conversation he had with Wells is substantially set out in his (Wells') answer—that he did not know of Hamilton's indebtedness to any other person, except to a small amount—this conversation was before the entry, but whether at the time of the entry or not, he does not know—he told Wells if his debt could be saved, he would make a deduction—this conversation was in the summer or fall of 1843—all of the particulars of the conversation he does not recollect, but it left the impression on his mind that he could not secure his debt in that way.

William C. Remington states that Hamilton told him that he had got from Wells, for the land Wells, had got from him a horse and a gun—that he did not know of the indebtedness of Hamilton to any one—that Hamilton lived about a mile from Wells, and between Wells and Platte City, on the road from Wells' to Platte City.

The complainants then closed their evidence by reading the exhibits in their bill, to which no objection was made.

The defendants then introduced Thomas Hamilton, one of the defendants, who testified that he had a pre-emption right on the land now in controversy, but was not able to enter it—that he had various offers for it before the time of entry came on—that as the time approached the offers became less in value—at one time he was offered \$500, and have the land entered—at another time he was offered \$250, and enter the land himself, both of which he refused. That he got a fraction of about 33 acres of surveyed land on the south side of the creek, with some 6 acres in cultivation, a cabin and stable, and some 18 or 20 acres on the other side, under fence, which had been washed down, with the benefit of such claim as he might have after it was surveyed—that he looked on it as valuable to him, being near the river where the boats landed, and the wood he expected to be valuable, and he then thought it as valuable as the land he had sold—that Wells agreed with him to furnish the entrance money for the whole quarter section, for one half quarter, and he, Hamilton, to have choice of halves; and on the 30th October, 1843, he entered the land at the land office in Plattsburg, Wells furnishing the entrance money, and that he assigned the certificate for the quarter section to Wells, in the land office at the time; Wells, at the time of assignment, paying him nothing for the half quarter, of which he had choice, but promising him, (no writing being given,) that he, Hamilton, might sell it, and he, Wells, would convey to the purchaser, or Hamilton might select a claim on public land, and he, Wells, would purchase it for him, Hamilton, and keep



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his, Hamilton's, half of said quarter as his, Wells', own. That about two weeks after the entrance of the land, and not so long as four weeks thereafter, he came across Mathias Yocum's claim of public land in the Missouri bottom, and was pleased with it, and agreed with Yocum for it, at \$75 in trade, provided, as he told Yocum, he could get a friend to help him pay for it. That he went to Wells, who paid a horse at \$40, and a gun at \$25, and not having other property upon which Wells and Yocum could agree on the price, he, Hamilton, gave a cow and two calves of his own at \$10, and Wells afterwards paid him \$10 in cash, for which the cow and two calves were put into the trade. On the purchase of the claim from Yocum, Yocum executed a bill of sale to him, in which the consideration was expressed to be \$200, for the claim. In the course of his examination, some five minutes afterwards, he repeated the same thing, and it was then demanded of him, why he had not inserted in the bill of sale \$75, according to the truth, instead of \$200, when he hesitated, and upon the enquiry of the attorney of Wells, whether the \$200 in the bill of sale was not by way of penalty, and the consideration expressed to be for \$75, he assented. He said Wells wrote the bill of sale. It was demanded of him whether Wells had not promised to pay his children for the half of the quarter entered, to which he replied, that such promise had not been made to him. It was then demanded if Wells had not made such promise to the children, or any other person, to which, after a little hesitation, he said not to his knowledge. He said that at the time he transferred the certificate to Wells, he trusted to Wells' honor for the proper disposition of the half to which he was entitled, and then told Wells that he wanted to sell it to pay his debts. At the time he and Wells started to pay Yocum for the claim bought of him, it was said between him and Wells, that if Hamilton got the Yocum claim, it was to be in full satisfaction for his half quarter of the land entered by him. Says he does not know the persons who offered him \$500, nor the \$250, for his claim before its entry, they being strangers—that he had told Mr. Martin that he wanted to sell his claim before its entry, and for Martin to make him an offer, which he did not do—said he was anxious to sell his claim to pay his debts, and after the entry had frequently offered to sell his half but could find no purchaser, until it was disposed of to get the Yocum claim, which he considered as valuable to him as the half quarter which he let Wells have, and as much as he could get for it. When demanded of him to whom he offered to sell the half quarter section of entered land, he could not tell, but said he did not offer it to his creditors. The claim obtained from Yocum has since been entered from him and he

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has lost it—just before the entry by him, Martin, one of the complainants, applied to him to come to Platte City, and confess a judgment on the debt to him as assignee of Wilson and Baldwin, and he promised to do so, but was too sick to do it. Platte City is about one mile from where he lived, and Plattsburg, where the land office was located, was about thirty miles. None of his creditors lived over a mile and a half from him.

The only fact necessary for the complainants to establish, to entitle them to the decree rendered in their favor, by the Circuit Court, in this cause, and about which any difference of opinion can exist, is the fraud charged in the bill, in the conveyance by Hamilton to Wells, of the half quarter section, which, under the agreement, was to belong to Hamilton, in consideration of his right of pre-emption on the quarter section entered with the money of Wells.

The answer of the defendants, and the testimony preserved in the bill of exceptions, show that Hamilton was insolvent, and a settler on the public domain, and entitled, under the laws of congress, to a pre-emption on the quarter section of land whereon he lived, which was worth from \$800 to \$1000; whilst Wells was a neighbor, and although living within one mile of him, they were but slightly acquainted with each other, and the latter entirely ignorant of the pecuniary condition of the former. Under these circumstances, the answers allege that Hamilton applied to Wells to furnish him the means of entering the land on which he resided, and proposed, in consideration thereof, to give him one half of the land, Hamilton reserving to himself the right of selecting. If Wells was willing to advance \$200 for the most indifferent half of the quarter about to be entered, the presumption is, that the other half was worth at least an equal sum.

The land was entered with the money of Wells, and instead of Hamilton executing to him a deed, or giving to him a bond to convey one half of the quarter, in conformity with the agreement, he, on the day of the entry in the land office, assigns or transfers to Wells the whole quarter section, and that without any previous agreement or consideration, touching the one half. Why such haste in divesting Hamilton and investing Wells with title? Such conduct being so foreign from the ordinary mode of transacting business, would be inexplicable but for the fact that, prior to this time, the complainants having learned that a negotiation was going on between the defendants concerning the land, had called upon the defendant Wells, and requested him to retain in his hands an amount sufficient of the purchase money to satisfy their demands against Hamilton. The transfer of the certificate for the entire quarter section, must and could only have

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been superinduced to prevent the land from being subjected to the payment of the complainant's demand. No other satisfactory reason can possibly be assigned for the transfer, at the time it was made, nor is any attempted to be given by the defendants, for conduct so unusual, so inconsistent with propriety and the interest of Hamilton.

But it is said by the defendants, that after the assignment of the certificate of entry, and before the complainants acquired any lien by operation of law, on the half quarter owned by Hamilton, he sold the same to Wells for a valuable consideration, that is, for the Yocum claim. The Yocum claim, according to his description of it, was entirely vague and indefinite. It was a settlement on a fraction of 33 acres of government land, in the river bottom, subject to inundation, with two or three cabins, and six or eight acres in cultivation, together with as much land on the opposite side of the creek as he could hold, and some rails across the mouth of Bee creek.

Such a claim as this, estimated by some of the witnesses as worth only \$20 or \$30, and which was afterwards sold by Hamilton for \$15, is estimated by defendants as being of equal value with the 80 acres of land admitted to be worth \$400 or \$500. It appears to be impossible that any rational man would make such a contract, and if Hamilton be such a simpleton as to know no better than make such a sale, Wells, as a conscientious man, should not consent to reap such a profit out of the weakness of his co-defendant.

We are of opinion that the Circuit Court committed no error in making the decree, and the other Judges concurring herein, the decree is affirmed.

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HOUX vs. RUSSELL.

An action for money had and received will lie against an attorney, who, having a debt for collection, receives in payment debts on himself, or on others, without authority from his principal.

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### ERROR to Callaway Circuit Court.

REED, HARDIN & LEONARD, *for Plaintiff in Error* :

1st. Whatever is received as money in payment of a money demand, may be recovered as such against the party receiving it, in an action for money had and received.

Emerson vs. Baylies, 19 Pick. Rep. 57. Payson vs. Whitcomb, 15 Pick. Rep. 215. Randall vs. Rich, 11 Mass. Rep. 497. Miller vs. Miller, 7 Pick. Rep. 135. Tinslar vs. May, 8 Wend. Rep. 551. Beardsley vs. Root, 11 John. Rep. 467. Ward vs. Evans, 2 Lord Raymond, 928.

2nd. An attorney at law charged with the collection of a debt for his client, has no authority to receive notes upon third persons in payment of the demand,—and if he does, he is liable to his client, as for money had and received.

Molly Floyd vs. Day, 3 Mass. Rep. 404. Ainslee vs. Wilson, 7 Cowen Rep. 668. Smock vs. Dade, 5 Randolph's Rep. 639. Langdon et al. vs. Potter, 13 Mass. Rep. 319.

3rd. If a person authorized to collect money for another, receives in payment thereof, debts upon third persons, a presumption arises after the lapse of a reasonable time, that the debts so received have been collected.

4th. The instruction given at the instance of the defendant was manifestly erroneous in making the whole case turn on the question, whether the notes were received by the defendant for the benefit of his client, regardless of the question whether they had been subsequently collected.

DUNCAN & TODD, *for Defendant in Error* :

1st. The plaintiff must prove the receipt of money by defendant for plaintiff's use, before he can recover on the counts—and cannot recover for the receipt of promissory notes or chattels for plaintiff's benefit.

2nd. If promissory notes were taken in discharge of the plaintiff's debt, without his assent or direction, it is a misfeasance, for which a special action may be had.

3rd. There is no authority which justifies the doctrine that notes taken in discharge of a debt is money in the collector's hands, except when he receives those notes to his own use, or uses them for his own benefit.

4th. The plaintiff could not recover on these counts, for the amount of the notes thus taken in payment upon a presumption of their being collected from lapse of time, as money, and by no action, unless upon the assumption of the receipt of them for his use, and for his benefit, and a special demand and count for a breach in the collection of them.

McBRIDE, J., *delivered the opinion of the Court.*

Houx commenced his action of assumpsit against Russell in the Callaway Circuit Court on the 23rd September, 1845. The declaration was for money had and received, for interest upon said monies, and upon an account stated. Plea—non-assumpsit and issue.

At the April Term, 1846, a trial was had, and the plaintiff took a non-suit, and moved to set it aside. 1st. Because the Court refused the

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plaintiff's instructions. 2nd. Because the Court gave the defendant's instructions.

The motion was overruled, exceptions taken, and the case brought here by writ of error.

The bill of exceptions discloses the following facts:—Defendant's receipt, as an attorney at law, for two notes on Dr. Farrar, for about the sum of \$1200, to collect and account for to plaintiff, the settlement of those notes by Farrar, part in cash, part in claims on the defendant, and the residue in cash notes, under an agreement made by Farrar with the defendant, the cash notes at a discount of ten per cent. and bearing interest at the same rate, endorsed in blank to the defendant. A demand made by the plaintiff's attorney on the defendant prior to the institution of suit and a failure to pay—partial payments made by defendant to plaintiff, amounting in the aggregate to about \$850.

Upon the evidence given, the plaintiff asked the Court to decide the law to be:—

1st. If the defendant was an attorney of this Court, and received for collection the two obligations mentioned in the receipt given in evidence as therein stated, and afterwards, about the 13th April, 1844, received from the maker of the said two obligations in satisfaction thereof, money demands against himself, and notes upon third persons, endorsed in blank by the payees, to the amount of the said two notes, and interest, and surrendered up the said two notes as satisfied; and if afterwards, and just before the commencement of this suit, the plaintiff demanded of the defendant the proceeds of the two notes mentioned in the receipt, and the same was not upon such demand, or at any other time paid over to the plaintiff, that then the Court ought to find for the plaintiff.

2nd. If the defendant received for collection, as an attorney at law, the two obligations mentioned in the receipt given in evidence, as therein mentioned, he had no authority to receive in payment of the same, the notes of third persons, without some express authority from the plaintiff for that purpose, and there is no evidence of any such authority.

3rd. If the defendant received as money the notes of third persons in payment of the debts in his hands for collection, the same may be recovered in this action as money had and received. If the defendant received the notes of third persons, in payment of the debts in his hands for collection, and a reasonable time for the collection of the same elapsed before demand made, and the commencement of this suit, the



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presumption is, in the absence of proof to the contrary, that the defendant had collected the money before the demand was made.

The Court refused so to decide the law, to which the plaintiff excepted.

The defendant then asked the Court to declare the law to be :—

1st. If the Court find that the defendant received from Farrar, the debtor of the plaintiff, notes in part payment of the debt for the benefit of the plaintiff, he, the plaintiff cannot recover in this action as for money had and received for the plaintiff, nor upon any breach in the declaration.

2nd. If the evidence shows any balance due by the defendant, the plaintiff cannot recover damages by way of interest, until after demand made for the money.

The first proposition, the Court sustained, and overruled the second ; to the sustaining of the first the plaintiff excepted, and took a non-suit, with leave to move to set the same aside.

The plaintiff then filed his motion to set aside the non-suit for the reasons :—

1st. The Court erred in refusing to declare the law of the case as prayed by the plaintiff.

2nd. The Court erred in declaring the law of the case as prayed by the defendant.

The Court overruled the motion, and refused to set aside the non-suit, to which refusal the plaintiff excepted.

It is unquestionably true, as a general rule, that the action for money had and received, cannot be maintained unless the evidence establishes the fact, that the defendant has actually received money ; but there are exceptions to this, as well as to most other general rules. As where the agent received negotiable paper, it was held to be equivalent to the receipt of money, and an action for money had and received would lie. 2 Esp. N. P. 571. So if the agent being indebted to the debtor of his principal, cancels his own debt by allowing a credit on the demand of his principal, the principal may maintain his action for money had and received, although no money actually come into the agent's hands. Willis's Rep. 400. In the case of Beardsley vs. Root, (11 John. Rep. 465,) Root, as the attorney of Beardsley, purchased at Sheriff's sale a tract of land sold under an execution in favor of his client, for a sum exceeding the amount of the execution, and agreed to pay the balance of the purchase money to the parties entitled thereto. He directed the Sheriff to return the execution satisfied, and gave to him a receipt for

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the amount of his client's demand, and took from the Sheriff a deed to himself for the land purchased; subsequently, he offered the land to Beardsley, who refused to take it, and commenced his action for money had and received, to recover from the attorney the amount of his execution.

The Court says:—"It may be true that the defendant intended to purchase the farm mentioned in the case, for his client, though judging from the facts before us, it would rather seem that he bought it on his own account. The fact of taking the deed directly to himself, and not to his client, affords a more clear indication of his real intention at the time of the sale, than his declarations made before and after. But admitting that he meant to make the purchase in behalf of his principal, still, having no authority from him for that purpose, he cannot compel him to accept of it. It is not pretended that his employer gave him any express authority or direction to make the purchase for him; and no such authority was derived from his retainer to collect the debt due from Elijah Beardsley.

"Admitting, however, for a moment, that an attorney may be justified in making a purchase in behalf of his client, when such a measure is indispensably necessary to save or secure his debt; yet this is not even a case of that description. On the sale of the farm, Hasbrouck offered to give within one dollar of the sum for which it was struck off to the defendant; and it is admitted by the case, that the price for which the farm was sold, exceeded the amount of all the executions in the Sheriff's hands; so that there was not the least necessity for the defendant to become the purchaser, in order to secure his client's demand.

"If the defendant was authorized to make this purchase on account of his principal, the latter was bound to accept it, according to the terms upon which it was made. By these terms the defendant stipulated to pay the amount due to Hasbrouck upon his judgment, which he has actually done; and Phineas Beardsley, consequently, became liable to reimburse the defendant the money thus paid. To permit an attorney in this way to make his client his debtor, might frequently lead to the most injurious consequences. Many clients, instead of recovering and receiving their money, according to the ordinary course of proceeding, would, unexpectedly, find themselves involved in intricate and extravagant speculations, to the management of which they might be totally incompetent; and which, in the end, might prove ruinous.

"The defendant could not make himself a trustee for his principal against his will, and throw upon his hands a purchase which his interest

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did not require him to make. Suppose the farm had turned out to be worth one-half the sum which the defendant gave for it, would Phineas Beardsley have been obliged to take it? If Phineas Beardsley had ratified the purchase by some positive, unequivocal act, such as reimbursing the defendant the money paid to Hasbrouck, or agreeing to do so, he would have been bound to abide by it, however disadvantageous it might have proved. But so far from assenting to the purchase, it appears, from the defendant's own testimony, that soon after the sale, when the defendant offered him the Sheriff's deed, he declined to accept it; and, at the same time told the defendant he was already embarrassed on account of Elijah Beardsley, and preferred he should sell the farm."

We have copied more at length from the foregoing case than is usual, because we consider the argument as being obviously correct, and as covering most of the points arising in the case now before us.

Whenever an attorney undertakes to travel out of the plain line of his duty, he does so at his peril, and will be held to strict proof, that the departure was indispensable to secure the debt of his principal. There is no evidence in the case showing that Farrar was in doubtful circumstances, or that the plaintiff was in hazard of losing his debt, to demand the exercise of any such power as that on the part of the attorney. On the contrary, it was the duty of the attorney to prosecute the claim in his hands against Farrar, with due diligence and without delay;—so that the plaintiff, who was assignee of the notes, might, in the event of Farrar being unable to pay, have his recourse on the assignor. Instead of pursuing this course, the attorney received from Farrar, in discharge of his two notes, thirty-four small notes upon different individuals in the country, amounting in the aggregate to \$1013 15, and assigned to him in blank. Shall the law tolerate such a practice, and compel the plaintiff to receive these notes in discharge of his claims against Farrar, or postpone his right of action against the attorney until the attorney collects the notes? If the attorney could legally receive these notes in discharge of his client's demand, he may insist upon and compel his client to receive them from him; then, in lieu of two notes on the same individual, the payment of which was guarantied by the assignment, he would have thirty-four on as many different individuals. Let him put those in the hands of an attorney for collection, and let that attorney pursue the same course, and what will be the final result? When will he get his money?

It is contended for the defendant, that if promissory notes were taken by him in discharge of the plaintiff's debt, without his assent or direc-

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tion, it is a misfeasance, for which a special action may be maintained. This we think very probable. But why turn the plaintiff over to his special action, when the defendant has received what he must have considered as equivalent to money in discharge of his principal's debt, which called for money? We are of opinion that whatever is received as money, in discharge of a money obligation, should be regarded and treated as money. If so, the plaintiff might bring his action of assumpsit, for money had and received, as in the present case.

If the view we have taken of the case be correct, it results that the Court committed error in refusing to declare the law as set forth in the plaintiff's motion, and in giving the first instruction asked by the defendant.

The other members of the Court concurring herein, the judgment of the Circuit Court is reversed, and the cause remanded.

HEIRS OF M. M. KIRK VS. HEIRS OF JOEL H. GREEN.

The owner of land in New Madrid, injured by earthquakes, having sold his interest in the injured land, before the certificate for the location of land in lieu of that injured had issued, the title under the certificate vests in the vendee, as the "legal representative" of the original owner.

APPEAL from Cooper Circuit Court.

HAYDEN & ADAMS, for *Appellants*, contended:

1st. That the legal right to the land in dispute, being located in virtue of the act of Congress of the 17th February, 1815, is vested in the person who was the legal owner of the land, in lieu of which the location was made, at the time of the grant of the certificate of new location—and that in this case, Coxe, the confirmer of the land, was not the owner thereof, at that time, having previously sold the same to Edward Robertson, senior, who had sold the same to other persons, to whom Coxe had conveyed it. See 5th Mo. Rep. 147; *Wear & Hickman vs. Bryant*. See Act of Congress of 17th February, 1815. These alienees were his "legal representatives," and entitled to the land located as *such* representatives.

2nd. That the Circuit Court erred in excluding from the jury the evidence which was given and offered by defendant, conducing to show that Coxe had parted with his interest in the land in New Madrid, to Edward Robertson, senior, and others, prior to the obtaining of the certificate of new location, and of the making of said location—and that having so parted with his said interest, he had no interest, *legal or equitable*, in the land in dispute; and that to entitle the plaintiff to

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recover in this action, it devolves upon him to show that he has a legal or equitable right to the land. See the above mentioned authorities, and the act of the 11th February, 1839, entitled "An Act to amend an Act to regulate the action of ejectment." 9th Mo. Rep. 714. *Montgomery and wife vs. Landusky.*

3rd. That the Court erred in rejecting from the jury the evidence given them by defendant, conducing to show that he was the owner and possessor of the land in dispute, under and by virtue of the purchase thereof by Kavanaugh for the taxes due upon it.

4th. That the Court erred in permitting the plaintiff to read to the jury the deed, accompanying the depositions of Medley and wife, and the deed accompanying the depositions of Wm. Hendricks and Luraney Norman, which will be found at pages 7 and 10, of the record—and especially those parts thereof betwixt figures 1 and 2, as marked in the record, at page 11.

5th. That the Court erred in suppressing the depositions of Dawson, and others, filed in the cause by defendant—and also in not suppressing the depositions of Medley and wife, and others, taken and filed in the cause by plaintiff. See 4th Mo. Rep. 118; *Dobbins vs. Thompson.*

6th. That the Court erred in overruling the motion of defendant for a new trial of the cause.

**LEONARD & DAVIS, for Appellees, contended :**

1st. The plaintiff showed a *prima facie* right of recovery. Rev. Statutes, title "Ejectment." Sec. 2, *Wear and Hickman vs. Bryant*, 5 Mo. Rep. 147.

2nd. All the deeds from Coxe offered in evidence by the defendants, were properly excluded—because they did not show, either—

*First* : An outstanding legal title, recognized as such by the common or statute law of the State ; or,

*Second* : An equitable title in the defendant within the act of 11th February, 1839—concerning the action of ejectment. Laws of 1838 and 1839, page 40.

3rd. The deed from Spears to Gray was wholly irrelevant.

4th. The testimony of Wallace, that he procured the New Madrid certificate and made the location for Gray, was rightly excluded. *Wear and Hickman vs. Bryant*, 5 Mo. Rep. 147.

5th. The evidence offered to make out a title under our revenue laws was altogether insufficient for that purpose, and therefore properly rejected. Revenue Law of 12th December, 1820. (printed in 1 Edward's laws of Missouri, 731,) §20. *Reed vs. Morton*, 9th Mo. Rep. 870.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of ejectment brought by Green vs. Kirk, for the recovery of a tract of land in Cooper County. Greene obtained a verdict and judgment, and the Court having refused Kirk a new trial, he has brought the cause to this Court.

William Coxe was the owner of a tract of land in New Madrid County, which was injured by earthquakes. For the land thus injured, under the act of Congress for that purpose, the tract of land in controversy was selected under a certificate of location, dated 6th October, 1818. The certificate was to William Coxe or his legal representatives. No patent for the land in dispute has been issued. There was evidence that William Coxe, prior to the date of the New Madrid location, had



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*Heirs of Kirk vs. Heirs of Green.*

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conveyed his interest, in the land injured, to others. Green, the plaintiff and appellee, claimed under deeds from the heirs of William Coxe, who had departed this life.

Under this state of facts, was Green entitled to recover? The certificate of location on which the action is brought, is to William Coxe, or his legal representatives. When this Court held in the case of Wear and Hickman vs. Bryant, 4th Mo. Rep. 113, and 5th Mo. Rep. 154, that a New Madrid certificate to a purchaser or his legal representatives, was a valid instrument, it went far in determining this controversy. The decision of the Court in the above cause is in conformity to the practice of the officers of the General Government, to whom the disposition of the public lands belongs. The proper construction of the instrument, in the opinion of this Court, and the General Government, was, that the land was given to the first named purchaser at the time of the grant, if he at that time was the owner of the land, in lieu of which, the authority to make a new location was given. If he was dead and had not disposed of the land, it went to his heirs, but if he had aliened it before the grant, then his alienee, and those claiming under him, took the land by virtue of the words "or legal representatives," in the instrument, as the first original purchaser. It was considered as a common law grant to him who may be the owner of a particular piece of property at the time of the execution of the grant, such a designation of a grantee in a deed not being so uncertain as to render a conveyance void. If, then, the words of the certificate, "legal representatives," are considered in the event of the first named taker having disposed of his interest, as designating the first original purchaser, it must follow, that Coxe, having conveyed his interest in the injured land in New Madrid, before the certificate issued, then he had no title to it, and a conveyance by him or his heirs of the located lands would be as ineffectual as though he were not named in the grant. In the case of Montgomery and wife vs. Landusky, it was held that a certificate to the legal representatives of one, who before the certificate issued had sold the lot, would not operate to the benefit of the heirs of the person named. 9 Mo. Rep. 714.

We do not see how any question arises under the act of February 11th, 1839, supplementary to the act concerning ejectment. Our statute authorizing an action on a New Madrid location, the only question presented is, who is the owner of the title conferred by the certificate of location. The defendant set up no outstanding title, legal or equitable, but confines himself to showing that the instrument, which is the foun-

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*Kemp vs. Holland, Adm'r of Smith, dec'd.*

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dation of the plaintiff's action, confers no title, legal or equitable, on those under whom the plaintiff claims.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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KEMP vs. HOLLAND, ADM'R OF SMITH, DEC'D.

A widow must make her election of dower in six months, to entitle her to take under the third section of the act concerning dower.

### APPEAL from Callaway Circuit Court, (In Chancery.)

TODD & ANSELL, *for Appellant, filed a written argument.*

REED & HARDIN, *for Appellee.*

1st. That the slave did not come to Smith in right of the wife. On the death of her father, Smith acquired a right to her distributive share of the personal estate, (slaves being such by the laws of Virginia,) which authorized him to sell, assign, or dispose of it as he pleased.—Wallace vs. Taliaferro, 2 Call. Rep. 447, 491. At the sale, Smith purchased the slave Sophia. He had a right to bid or not, at his election; and consequently, stands precisely in the condition of any other purchaser. His purchases at this sale amounted to more than his wife's portion in the estate, and the additional sum paid out of his other funds. But as this slave was by virtue of the marriage his own absolute estate, a resulting trust in favor of the wife, cannot be contended for.

2nd. But if said slave had come to Smith in right of his wife, she lost the right by omitting to make her election in due time. Letters of administration were granted on Smith's estate, in October, 1840, and her deed of election presented to the Court in November, 1843. By the 6th section of the Dower Act of 1835, a widow, where there is no child of the intestate, is bound to make her election of dower within six months of the date of administration. Is it not equally important, and is she not bound, where there are children to make her election, in lieu of dower within the same time? But where is a child, or children, by former marriage, it is by election only that the widow acquires a right to separate part of the estate, until she make her election. She is entitled to only a child's part after payment of debts; and there being no separate right in the estate to guard, the administrator is at liberty to sell any part, taking care to act for the best interest of the distributees. Hence we see a reason why the widow should make her election in due time. The slave in question was sold by an order made twelve months after administration, by the Warren County Court. At this time, appellant's wife had no separate interest in this slave, for she had not made her election. Hamilton vs. O'Neil, 9 Mo. Rep. 11. The Court might well, therefore, order the

*Kemp vs. Holland, Adm'r of Smith, dec'd.*

slave to be sold to pay debts. It would be a strong game, indeed, if a widow could remain silent until the administrator had paid the intestate's debts out of that portion which she could not reach by election, and then come forward and claim all the estate which came by her to the exclusion of her late husband's children. The fact that she claimed and received the \$150, which the administration law gives to the widow, shows that this pretended election is an after thought.

3rd. But the slave, even if appellant's wife had a right, was subject to the payment of debts, (Rev. Code, 1835, p. 228, sections 3 and 4,) and the administrator having sold for that purpose, neither he, the widow, nor purchaser, can set the sale aside, whether such sale was necessary or not. She might, if she could show fraud and collusion between the administrator and purchaser;—but otherwise her remedy would be against the administrator. See 1st Story, 406. 2 Hen. & Mun. Rep. 69—Sale vs. Roy. 2 P. Williams, 148. 1st Atkyns Rep. 462, and authorities cited in Note 1. 2 Bibb, 189—Henning vs. Conner. 3 J. J. Marshall, 161—162. Lareu's heirs vs. Lareu's ex'r. 3 J. J. Marshall, 505, Ward vs. Lewis. Newland on Contracts, 512, 514. 2 Williams on Executors, 670.

SCOTT, J., *delivered the opinion of the Court.*

John Kemp, in April, 1844, filed his bill for an injunction and relief in the Callaway Circuit Court, in which it is set forth that he intermarried with Elizabeth Smith, widow of Samuel Smith, dec'd, who died in Warren County, in the year 1840. That Samuel Smith died leaving children by a former wife, and without children by his last wife. That his wife, the said Elizabeth Smith, prior to her marriage with the said Samuel Smith, had received as a distributive share from the estate of her father, a slave named Sophia, who since has had two children. That the said Samuel Smith died in solvent circumstances, leaving land, negroes, personal estate, money, and debts due him, and but little embarrassed,—his personal estate and debts due him fully competent to pay his debts. That the defendant, Thomas Holland, in October, 1840, took out letters of administration on the estate of the said S. Smith, in Warren County. That shortly after he had taken upon himself the burden of administration, and before any disposition was made of the slaves, his wife, the said Elizabeth Smith, gave notice to the said administrator, that she should claim as her dower, the slave Sophia and her increase, which had come to the said Samuel Smith in right of his wife Elizabeth Smith. Hearing that Holland was about to dispose of the said slave Sophia, for some purpose relative to the administration, Kemp attended the sale, and his wife with his consent gave Holland notice of her claim before the sale, and of her desire to have the said slave as a part of her dower, but notwithstanding the slave was sold, and he, Kemp, became the purchaser for five hundred and six dollars, upon a credit of 12 months, and gave his note with security for the purchase money. That when the note fell

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*Kemp vs. Holland, Adm'r of Smith, dec'd.*

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due, suit was brought thereon, and judgment obtained. That Kemp and wife, by deed, executed on the 6th November, 1843, released all right to the estate of Samuel Smith, other than the slave aforesaid, and her increase, and elected said slave and children as the dower of the said Elizabeth in the estate of her deceased husband, subject to the payment of debts, which deed was filed in the County Court of Warren County. That at the time of the sale of the said slave, and at the time of the execution of the deed declaring the election of dower, no distribution of the estate had been made, nor was such distribution practicable at the time, as no settlement had been made by the administrator. That no distribution has yet been made, nor has there been any assignment of dower. That the debts due by the estate did not require nor justify the sale of the slave, and that the administrator, by the hire of the slaves, and from the debts due the estate, and the sale of the perishable personal estate, could satisfy all demands against the estate. The bill concluded with praying that the judgment at law on the note given for the slave Sophia, may be perpetually enjoined, and the bond for the money be cancelled; if, upon a final settlement, allotment of dower and distribution of the estate, by the Warren County Court aforesaid, the said slaves of right belong to his, Kemp's wife, by right of her dower aforesaid, upon a full payment of the intestate's debts by the administrator, and such other relief as to equity belongs, and in the meantime, that the administrator be enjoined and restrained from collecting the said debt, until such settlement, allotment and distribution is made, and the further order of the Court.

The answer of the defendant, Holland, admitted most of the facts alleged in the bill;—professed ignorance of the fact whether the slave Sophia came to Samuel Smith in right of his wife. Denies that the estate of Smith was not embarrassed. Asserts that the debts amounted to \$1500, and that the perishable property and debts due, were insufficient to satisfy them. That the sale bill amounted to a little upwards of \$360, and but a small amount of the debts could be collected. Alleges that the slave Sophia and another were sold under an order of the County Court, a step necessary for the payment of debts.

There was a replication to the answer; and on the trial, the only evidence read, deemed material to be stated, was the records of the County Court of Warren County, showing the condition of the estate with respect to the debts. These records do not show that a sale of the slaves was unnecessary, nor do they show that the debt due by Kemp for the

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*Kemp vs. Holland, Adm'r of Smith, dec'd.*

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slave Sophia is not necessary for the payment of debts. The contrary may rather be inferred.

On the hearing, the injunction which had been previously granted, was dissolved, and the bill dismissed.

Assuming that the slave Sophia came to Samuel Smith in right of his wife, it is objected that his widow, Elizabeth Smith, did not make her election to take under the third subdivision of the third section of the act concerning dower, Rev. Code, 1835, within the time prescribed by law, and was therefore thrown on the general provision respecting dower. The third subdivision of the 3rd section of the act concerning dower, enacts that when the husband shall die having a child or descendant, but not by his last marriage, his widow may, in lieu of dower, elect to take in addition to her real estate, the slaves and other personal property in possession of the husband, that came to him in right of the wife, by means of the marriage. The 5th section of the same act provides, that when the husband shall die without a child or other descendant living capable of inheriting, the widow shall have her election to take her dower as provided in the 1st section of the said act discharged of debts, or the provisions of the 3rd section subject to debts. The 6th section provides that "such election shall be made by a declaration in writing, acknowledged before some officer authorized to take the acknowledgement of deeds, and filed in the office of the Clerk of the Court in which letters testamentary or of administration shall have been granted, within six months after the grant of the same."

It was contended that the words "such election," in the last recited section, only referred to the election given by the preceding section. The statute had provided that in two events, widows might make an election to take dower in a manner different from the usual mode. This election is given by two different sections, and a subsequent section immediately following them provides that "such election" shall be made in a particular manner, and within a prescribed time. There is nothing in the import of these words which would limit their reference to election given by the 5th section. There is no reason why they should thus be limited in their application. The necessity for prescribing a manner and limiting a time within which the election should be made, was as urgent in the one case as in the other. The inconvenience resulting from an indefinite time in which an election as to the kind of dower to be taken is to be made, is as great in the one case as in the other. When neither reason nor the import of the words employed would limit their influence only to the 5th section, there is no propriety in narrow-



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ing their influence to a degree that would leave uncovered by the statute many cases that would as much require its correction as those for which it is admitted it was provided.

No election having been made by the widow within the time prescribed by law, that she would take the slaves and other personal property in the possession of her deceased husband at the time of his death, which came to him in her right by means of the marriage, all relief to the complainant on the ground that the slave Sophia, sold to him by Kemp, the administrator, was his own property, was properly refused.

As no writ of error will lie on an order dissolving an injunction, there can be no complaint on the score of its dissolution. *Powers & Ashley vs. T. & C. Waters.* The only remaining point then in the case will be, whether the account of the administration, as exhibited, would justify this Court in extending any relief to the complainant. Is there any thing set forth which would show that the enforcement of the judgment would be oppressive? The law has entrusted the County Courts with the settlement and distribution of the estates of deceased persons. Those tribunals know best the condition of an estate at any time, and when money is wanted for the purposes of administration. It would certainly very much embarrass the administration of estates, if every debtor who might ultimately have a distributive share in it, could at any time enjoin the collection of debts due by him, and compel a settlement of the accounts of the estate in order to ascertain whether there might not be found something due him. These negroes have been sold by order of the County Court, for the purposes of paying the debts; there is nothing showing that such a step was not necessary, and because a person having an interest in the estate became the purchaser, we are required to enjoin the collection of the purchase money. We do not think that this Court would be warranted in interfering with this matter unless it appeared that the complainant, Kemp, had been allowed a distributive share of the estate. In such an event, as it would be oppressive to collect money from a debtor, merely that it again be returned to him, an injunction would be proper. But in this case, no order for distribution has been made, the money is wanted for the payment of debts, and even if it were not, it by no means appears whether all or what proportion of it would belong to the complainant upon a distribution of the assets.

The other Judges concurring, the decree of the Court below will be affirmed.

*Mitchell and wife & Coxe vs. Tucker's.*

MITCHELL AND WIFE & COXE vs. TUCKER'S.

1. Before the introduction of the common law, the Spanish law prevailed in the territory ceded by France to the United States. And under that law a deed was not necessary to convey land: it could be conveyed by parol.
2. An instrument authorizing a party to relinquish all the grantor's right to certain land to the United States, and to select for his own use other lands in lieu of those thus ceded—under the Spanish law, is equivalent to an absolute conveyance.
3. In actions of ejectment under our statute concerning New Madrid locations, a Court of law has the same powers as a Court of equity with reference to the title.

APPEAL from Howard Circuit Court.

*HAYDEN, for Appellants, contended:*

1st. To entitle the plaintiffs, as against the defendants, to recover the land in controversy, in the present action, it was sufficient for them to prove either a legal or an equitable title thereto. See Digest 1835, p. 234 §1, 2; see Acts 1839, p. 40.

2d. That the proofs which were offered by plaintiffs, and rejected by the Court, conduced to show in the plaintiffs both a legal and equitable right to the land sued for.

3d. That from the proofs given by the plaintiffs, it appears that defendants are mere intruders and trespassers upon the land, claiming no right thereto, and therefore, it was not, and is not competent for them to question either the regularity or formality of the conveyances, by which the ancestor of the plaintiffs acquired right and title to the land; nor is it competent for them, as intruders, under the circumstances of this case, to show title to the land in a stranger, to defeat the plaintiffs' action. 4th John. 211-12; 5 Littell's Rep. 316-18-19-20-21.

4th. That the Court erred in not setting aside the non-suit, and in refusing to grant the plaintiffs a new trial.

*LEONARD, for Appellees, contended:*

The only real question involved in this record is, whether the paper title offered in evidence, by the plaintiffs, was sufficient in point of law to maintain their action. Leduc's deed of November, 1815, which is an essential link in the plaintiffs' title, does not pass to Bates such title in question, as will maintain ejectment, and was, therefore, properly rejected; and with it fell also Bates' deed to Berry—Coxe and wife's to McDowell, and McDowell's to Coxe.

1st. It is not a valid deed under Lessieur's power of attorney of May, 1815. It is executed in the name of Leduc, the attorney, and is his conveyance, and not the conveyance of his principal. Of course, it can only pass Leduc's title, and not the title of Lessieur, his principal. Combs' case 9 Co. Rep. 76, 77; Frontin vs. Small, 1 Str. 705; Spencer vs. Field, 10 Wend. Rep. 87; Fowler vs. Sheerer, 7 Mas. R. 19; Parmers vs. Respass, 5 Mon. R. 563.

2d. It is inoperative for the present action as a deed passing Leduc's interest in the land, for the reason that Leduc had no such interest as will sustain the action, because:

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*Mitchell and wife & Coxe vs. Tucker's.*

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*First.* Lessieur's deed of May, 1815, is a mere power of attorney, and does not attempt to pass any interest in the land.

*Second.* If it must be construed a deed conveying a power coupled with an interest, and not a mere naked authority, yet it does not convey such an interest as will maintain the present action.

*Third.* Even with apt words of present conveyance, or of an agreement to convey, it would be void in either aspect, for want of a valuable consideration, either expressed or proved. *Mildway*, case 1, Co. Rep. 176; *Ward vs. Lambert*, Cro. Eliz. 394, 4 Cruise's Digest, 173, 178; *Saunders on Uses* 340; *Jackson vs. Alexander*, 3 John. Rep. 488; *Perry vs. Price*, 1 Mo. Rep. 394.

The other documents offered by the plaintiffs, and rejected by the Court, were either irrelevant or incompetent evidence—or if material and competent, were supplied by the other documents, subsequently read by the plaintiff, and so they were not prejudiced by the exclusion of the first.

*Scott, J., delivered the opinion of the Court.*

This was an action of ejectment begun by the appellants against the appellees, to recover a tract of land in Howard county. The appellants submitted to a non-suit, and after an unsuccessful motion to set it aside, have brought the cause to this Court.

The possession of the appellees of a part of the disputed premises, was admitted on the trial. They set up no title to the land, but relied on their possession. The appellants, on their part, showed that a tract of land, in New Madrid county, had been confirmed to Firman Lessieur, by a board of commissioners appointed under an act of congress, passed for the purpose of adjusting the land titles in the country ceded by France to the United States, by the treaty of 1803. That Firman Lessieur died prior to the year 1820, and that Raphael Lessieur was his only heir at law. After the passage of the act of 17th Feb., 1815, for the relief of those whose lands, in New Madrid county, had been injured by earthquakes, Firman Lessieur, by an instrument of writing under seal, dated 4th May, 1815, for divers good considerations, authorized and empowered Mary P. Leduc to relinquish all injured lands belonging to him, (among which was the tract, in lieu of which, the premises in controversy were located,) to the United States, and select for his own use other lands, in accordance with the provisions of the last recited act of congress. This deed contained a power of substitution. By a deed, dated 20th November, 1815, Mary P. Leduc conveyed to Edward Bates the aforementioned tract of land, confirmed to F. Lessieur, and appointed Bates the grantor's attorney in fact, and substitutes him as the attorney of his principal, and finally confers upon him all the powers in relation to the lands therein mentioned, which were conveyed to him by Raphael Lessieur's deed. This deed was executed by Leduc, in his own name, and not as attorney for Lessieur.

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A certificate of location was afterwards issued to Firman Lessieur, or his legal representatives, in lieu of the tract of land confirmed to F. Lessieur, and which had been injured by earthquakes.

This certificate was conveyed by Bates to Taylor Berry, to whom it was delivered, and by whom it was located, by a deed which is executed in the same manner as the deed from Leduc to him.

On this certificate a patent for the land in controversy, issued to F. Lessieur, or his legal representatives, dated 3d July, 1820.

The appellants deduce a regular title from Berry, the alienee of Bates.

From the foregoing facts, the questions arise, whether the instrument executed by Raphael Lessieur to Leduc was effectual as a conveyance, or, if not so, then whether the conveyance by Leduc to Bates could be made so?

All the objections made to the efficiency of the instrument from Lessieur to Leduc, as a conveyance, are predicated upon the common law. By reference to the date of the instrument, it will be seen it was executed on the 4th May, 1815, a period prior in point of time to the introduction of the common law in this State. Before the introduction of that law, the Spanish law prevailed in all the country west of the Mississippi, ceded by France to the United States by the treaty of 1803, unless where it had been altered expressly or impliedly, by the legislation of congress or of the States or territories composed of the ceded domain. By the Spanish law, which prevailed here prior to the introduction of the common law, land might have been aliened by parol. This is well settled. So in the civil law, which is the foundation of the Spanish system of laws, no verbal solemnities were required to give validity to a contract. All that was required, was the apprehension and consent of each party, expressed in any form of words. Justin Lib. 3, title 26.

After the passage of the act of 17th Feb., 1815, for the relief of those inhabitants in the territory of Missouri, whose lands had been injured by earthquakes, two modes of alienation were adopted by those who held injured lands. One was to convey the land injured directly to the purchasers, the other was that employed by the parties to the instrument now under consideration, viz: a power of attorney authorizing the purchaser to select lands for his own use, in lieu of those injured, and an authority to him to relinquish to the United States all right of the vendor to the injured lands. It is difficult for one unfettered by technical rules, to say that such an instrument was intended to have any other effect than a conveyance. It is surely a power coupled with an interest. If such was its design, I know of nothing in the Spanish law which will prohibit this

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*Mitchell and wife & Coxe vs. Tucker's.*

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Court from so regarding it. As to the matter of a consideration, we do not suppose that to an actual conveyance, any more than to a gift, a consideration is necessary. The construction put upon the statute of uses, 27th Hen. 8th, requires a valuable consideration to make effectual a deed of bargain and sale; but for the reasons above given, we do not consider this question at all under the influence of that statute. If this view of the subject obtains, then the instrument executed by Raphael Lessieur to Leduc, was an actual conveyance, or power coupled with an interest, which would enable the attorney to convey in his own name.

But if this question is considered under our own law, in connexion with the statute of Feb. 11th, 1839, entitled, "an act to amend an act regulating the action of ejectment," it might be questionable whether the appellants are not entitled to recover. The object of that statute was to enable litigants, respecting New Madrid claims, to settle their controversies finally in Courts of law, without recourse to a Court of equitable jurisdiction; or in other words, in actions wherein the right to a New Madrid location is involved, the jurisdictions of a Court of law and equity are blended, and that justice is administered in a Court of law, which, in other cases, would be obtained only in a Court of equity. This being the object of the statute, it cannot be evaded by a party who holds possession of the land and claiming no title himself, merely impeaches that of his adversary. To give effect to the statute, we must consider him as asserting the better title, which he shows to be outstanding, and treat the case accordingly. If those in whom the better title exists were parties, and equity could give relief, the statute would be evaded, if one in possession, defending himself on that title, should not be considered as asserting it. There is no injustice in this to those in whom the outstanding title is really vested. They being no parties to the suit, their rights cannot be affected by it. The appellees assert no right in themselves to the land. They merely object that the title of those who would eject them is defective. If those in whom that outstanding title exists were parties to this suit, and the appellants could shew that, as against them, it was no defence to make the statute commensurate with the evil it was designed to remedy, we must regard those objecting an outstanding title, as asserting it in themselves. If the deed from Lessieur to Leduc be considered as a mere power, and Leduc, in the execution of that power, has committed a mistake, it is one which a Court of equity will correct. The proposition just stated has undergone examination in the Courts, and it has been maintained that it is within the province of a Court of equity to relieve against such a mistake. Judge Tucker says, "that though a deed



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be executed by the attorney informally, so that it will not pass the legal title, or enable the grantee to sue the principal at law, yet if he has not exceeded his authority, it would bind the principal in equity as a contract; and would, in the case of land, doubtless give an equitable title," 1 Com. 89; see *Parmer vs. Respass*, 5 Mon. 567. So Judge Story says, "if a person be authorized by a power of attorney to make a release, and he draws and executes the same in his own name, it will not bind his principal, or be the release of the latter. A Court of equity might, indeed, if the release were for valuable consideration, compel the principal to make a release in his own name, or compel the agent to execute a proper release, or grant other relief adapted to the circumstances." Story on Agency, §148.

The only objection to this view of the subject is, that it does not appear that the deed, from Lessieur to Leduc, was for a valuable consideration, consequently, as against Lessieur, the appellants would be regarded as volunteers, and would therefore be denied relief in equity. Whether the words, "for divers good considerations," would import a valuable consideration, in the Spanish law, we are not informed. Their import in our law is well understood, and such effect is not given to them. So it might be questioned how far the appellees, being, according to their own showing, mere intruders, would be allowed to object the want of consideration as between Lessieur and the appellants.

It is clear that as against the appellees the appellants are not entitled to recover, unless they could recover against Lessieur himself; yet, in cases of this character, would not the ends of justice be subserved, by regarding Lessieur as acquiescing in, and acknowledging the justice of the claim of the appellants?

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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*Brown vs. Gauss.*

## BROWN vs. GAUSS.

Assumpsit will not lie for services rendered under a contract under seal.

## APPEAL from Chariton Circuit Court.

*CLARK, for Appellant, contended:*

1st. This being an action for money had and received, to the plaintiff's use, the only question involved was, whether the defendant had received money belonging to, or for the use of the plaintiff, and whether he had, or not, was a question for the jury and not for the Court. 7th J. R. 132. If this position is correct, the Court clearly erred in the instruction given, by which the case was taken entirely from the jury.

2d. It is contended that by the agreement between Brown and Gauss, Brown was to have the boy Robert, if all three negroes were found by Brown, or any other person; and if any number less than the three were found, he was to have in like proportion; in case all were found, he was to pay back to Gauss the fifty dollars advanced, and the reward and expenses of the negroes while confined, if the same were claimed; there being no reward or fees claimed, Brown, as a matter of course, had none to pay, and the fifty dollars which Gauss had advanced to him, and which he was to refund, in case all the negroes were found, was but a debt due from him to Gauss upon that contingency, and did not affect his right to the boy Robert; but, if it did, when Gauss sold him and received the money, he received for his own use all that Brown was bound to refund, and the balance to Brown's use. 1st Wend. 202; 6th Cowen 90; 3d Cowen 624.

3d. If Brown had a right to the boy Robert, when all three negroes were found, he had the privilege of affirming the sale made by Gauss, and proceeding against him for money had and received in this form of action; and to maintain his action, he was bound to show his interest in the property sold, which was amply shown by the written contract between the parties. 6th Cowen 90.

*DAVIS, for Appellee, contended:*

That the record shows in the appellant no right of recovery in this action.

1st. Because the written contract given in evidence is still subsisting between the parties, and not executed or otherwise put an end to.

2d. Because by the terms of that contract, the property in the slaves, or any part of them, never did vest in Brown, until he does certain acts and performs certain conditions precedent, and until the property vests, money had received will not lie for a sale of it by another. See 1 Ch. Pl. 349; 7 Mo. R. 433; *Christy vs. Price*, adm'r.

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*Copeland vs. Loan.*

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SCOTT, J., *delivered the opinion of the Court.*

This was an action of assumpsit on the common counts, in which the appellant Brown, the plaintiff, submitted to a non-suit, and after failing to have the same set aside, appealed to this Court.

It seems that Gauss, the defendant and appellee, had lost three slaves, who had escaped from his service; with a view to recover them, he entered into contract under seal with Brown. This contract contained many stipulations respecting the compensation of Brown for retaking the slaves. After the execution of the agreement, Brown went in pursuit of the slaves, in various directions, and spent some twenty-five or thirty days in endeavoring to find them. He was unsuccessful. The slaves, it seems, afterwards came to the possession of their master, Gauss, and were sold by him. This action is brought by Brown, to recover the compensation to which, he alleges, he is entitled under the agreement.

The only question in this case is, whether an action of assumpsit will lie for the services rendered by Brown, there being a contract under seal respecting the compensation to which he is entitled. This question has been repeatedly determined by this Court, and it must now be considered as at rest. *Clendennen vs. Paulsel*, 3d Mo. R. 230; *Crump vs. Mead*, et al, *ibid* 231; *Garred vs. Macey & Doniphan*, 10th Missouri Reports, Judge Story, in the case of the bank of Columbia vs. Patterson's adm'rs. 7th Cr. 299, says: we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract not under seal, when the contract has been completely executed. There is nothing in this case to distinguish it from the others. The sealed contract has merged all others of an inferior nature, and recourse can only be had to it.

The other Judges concurring, the judgment will be affirmed.

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COPELAND vs. LOAN.

In an action on a note given for the purchase of a tract of land, a plea alleging a want of title in the vendor, should shew specifically the defect in his title. It is not sufficient to allege generally that he had no title, or that the fee simple is in another.

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*Copeland vs. Loan.*

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## ERROR to Jackson Circuit Court.

LEONARD & BAY, *for Plaintiff in Error, contended:*

1st. The pleas contain a good defence to the action, and the demurrer was therefore improperly sustained. The consideration of a note may be always enquired into in a suit on the note between the original parties. Hills vs. Bannister, 8 Cowen, 31. Pearson vs. Pearson, 7 J. R. 26. Schoonmaker vs. Roosa, 17 J. R. 303. Rann vs. Hughes, 7 Term R. 350, note. Slade vs. Halsted, 7 Cowen, 322. See also R. S., 1845, title "Practice," 832, sections 19, 20, 21.

2nd. The facts stated in the pleas show a total failure of consideration;—a note given for the purchase money of land to which the vendor had no title, is without consideration. Frisbee vs. Hoffnagle, 11 J. R. 50. Jones vs. Shaver, 6 Mo. R. 642.

STRINGFELLOW, *for Defendant in Error:*

1st. The first plea is defective; the fraud set forth not being fraud in procuring the note, but merely fraudulent representations of the consideration of the note.

2nd. The pleas alleging a failure of consideration, are defective in not setting out the contract between the parties for the sale of the land. It should appear whether the contract was reduced to writing. It is submitted that when the vendor has given to the vendee a title bond, or covenanted to make a deed, the vendee must rely upon his covenant, unless he shew by his plea that the vender is insolvent, or other cause sufficient to warrant this defence. A Court of law has no power to compel the vendee to surrender his covenant, and thus place the parties in their original situation by rescinding the contract; and hence, will not enable the vendee to avoid the payment of the purchase money, and still hold the vendor bound to make a title. Bruffey vs. Brickey, 5 M. R. 400.

SCOTT, J., *delivered the opinion of the Court.*

The defendant in error brought an action by petition in debt, on a promissory note, executed by the plaintiff in error. The plaintiff in error filed four special pleas, alleging in substance, that the note sued on was obtained by fraud and misrepresentation in this, that the said Loan, the defendant in error, fraudulently represented himself to the plaintiff's in error, to be the owner of a lot of ground in the town of Independence, which he sold to them for the sum of \$500—\$100 of which was paid, and that the note in suit was given for the balance. That the said defendant was not, at the time of sale, and is not, the owner of the said lot of ground. The two last pleas allege also that the fee simple of the lots is in the County of Jackson. There was a demurrer to these pleas, and judgment given on the demurrer for the defendant in error; afterwards, the plea of *nil debit*, which had been filed, was withdrawn, and judgment entered for the defendant in error.

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*Copeland vs. Loan.*

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It may be conceded, that independently of the late statute in an action on a promissory note, a total failure of consideration might be set up as a defence, in order to defeat a recovery. *Cook vs. Greenleaf*, 2 Whea. 13. *Frisbee vs. Hoffnagle*, 11 John. 50. In both of these cases the consideration of the notes sued on was the conveyance of land, and from the report of them, it appears, that the fact that the plaintiff had no title to the land he had sold, was established by the defendants. A person sells another a tract of land, and puts him in possession of it, and when he asks for his purchase money, he is told that he has no title. The law allows this. But if it is allowed, is there any hardship in requiring him who asserts that the vendor has no title, to show it by his plea? The purchaser cannot know that the vendor has no title, unless he is informed as to the state of it, and it seems to be nothing but reasonable, that after he has so far confided in the vendor, as to buy his land on his representations, and enter into possession of it, that if he by his plea, objects his want of title, he should set forth the facts and circumstances which show that the vendor has no title. Courts of law, in entertaining this defence, exercise a power vested in the Courts of equity, and the practice in them, I believe, is never to allow an injunction against the recovery of the purchase money on the bare assertion that the vendor has no title to the land conveyed. It must be shown how it is that he has no title. A party's title may be affected in various ways, by fraud and forgeries unknown to the vendor, and to enable him to defend it, it should be shown wherein it is defective. There is no injustice in this. A contrary course might work injustice to vendors. The bare assertion in the two last pleas, that the fee simple in the lot for which the note sued on was given, is in the County of Jackson, does not obviate the objection that exists to these pleas.

The other Judges concurring, the judgment is affirmed.

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## JANUARY TERM, 1847.

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### SEARCY, ET AL. VS. PLATTE COUNTY.

1. An attachment will lie against the property of one of two joint contractors, on the ground of non-residence, although the other contractor may be a resident of the State.
2. The truth of the facts on which an attachment is issued, can not be investigated upon a motion—but only on a plea in abatement.

### APPEAL from Platte Circuit Court.

#### WILSON & REES, for *Appellants*, insist:

The only question in this case is, whether the statute authorising suit to be instituted in *ordinary* cases against either or all the obligors of a note, also authorizes suit to be commenced by attachment against a non-resident, when there is a co-obligor resident, good for the amount of the note. The appellants think not. See the attachment law; also *Hemstead vs. Dodge*, 1 M. R. 1st ed. 493; 10 Vermont Rep. 239; 4 Ohio Rep.

#### ALMOND, for *Appellee*, insists:

1st. No good reason is seen, in any point of view whatever, why the writ ought to have been quashed for the reasons set forth in said motion to quash—and the authority of the case of *Hemstead vs. Dodge*, 1 M. R. p. 493, is not in point, and does not sustain said motion; for in the case at bar, there is *not a summons for one defendant and a writ of attachment for others*, which was the error complained of in the case above cited from 1 vol. M. R.

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*Searcy, et al. vs. Platte Co.*

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2d. And to show that there is nothing in appellants' motion to quash the writ, the appellee refers to Rev. Stat. of 1845, State ed., p. 216 §4; 6 M. R. p. 50; R. Code 1845, p. 811 §20.

3d. And even if the facts that Spencer, one of the obligors in said bond, was a resident of the State and solvent, could, by any construction whatever, in any shape defeat the attachment against the Searcys, it devolved on appellants to shew these facts, and this they have clearly failed to do, as will be seen by reference to the bill of exceptions.

SCOTT, J., *delivered the opinion of the Court.*

The county of Platte sued the appellants by attachment for the recovery of a debt in the justices' Court. The ground of the attachment was the non-residence of the defendants. The cause was taken by appeal to the Circuit Court, when a motion was made to dismiss the suit, because it did not appear that Wm. Spencer, who was the security in the bond on which the suit was brought, was unable to pay it, or was a non-resident, and because the security in the bond was able to pay the debt, and was a resident of the State; the Court refused the motion and judgment having been entered against the appellants, their case is brought here.

There is nothing in the bill of exceptions relative to the residence or solvency of Wm. Spencer: the assumption of facts in a motion is no proof of their existence. In the case of *Graham vs. Bradbury*, 7 Mo. R., it was said that the truth of the facts on which an attachment issued could not be controverted by motion. Their existence can only be disputed by plea, or in a justice's Court on the trial. *Henry vs. Lane*, 2 Mo. R. 163.

But, admitting the truth of the facts assumed by the motion, we cannot see how they effect the judgment of the Court below. Our statute has made all joint contracts, joint or several, consequently a plaintiff can proceed against one or more joint defendants at his election. If those against whom he wishes to proceed are non-residents, and have effects within the jurisdiction of the Court, the principle is not perceived on which it may be prevented; this is not like the case of partners put in the argument, but it is one in which a resident surety is passed by and the non-resident principals are sued; surely there is justice and policy in the course pursued by the plaintiff. Had the security been made to pay the debt, he would have had recourse to this remedy against his principals, which would have been more onerous than if they had been first sued for the debt. Reference has been made to the case of *Leach vs. Cook*, in 10 Ver. 239, in support of the appellants' view of this subject, in which it was held that a foreign attachment cannot be sustained against a partnership as absconding or concealed debtors, unless all the members of

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 Joyce vs. Moore.
 

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the firm have absconded or kept concealed. In that case all the members of the firm were sued as concealed or absent, and a plea in abatement was put in, in which it was denied that one of the defendants was absent or concealed. On demurrer the plea was judged sufficient. This is a familiar principle, and would have been law here but for a late provision in our code, which allows in actions *ex contractu* a judgment against a less number of defendants than are sued; it will be seen, too, that in Vermont joint actions can only be severed when one of the defendants is a non-resident of the State. Rev. Stat. 166. In the matter of Cyrus Chapman, 14 John. 217, it was held that an attachment under the act against absent and absconding debtors may issue against the property of one of several partners who absconds, for a debt due by the partnership, although his co-partners are resident within the State and capable of being arrested. So in the case of Crespe vs. Perrett, Willes 467, it was maintained that a separate commission of bankruptcy may be taken out against one of several partners on the petition of a joint creditor. The principle of these two cases would lead much further than that involved in the one under consideration; but I am free to confess that the opinions of other Courts on questions of this character are entitled to but little weight as authorities, for they are all so much based on local legislation, and the phraseology of particular statutes, that they furnish a very unsafe guide to the Courts of this State, whose legislation on the same matter may be different from that which prevails elsewhere.

The other Judges concurring, the judgment will be affirmed.

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 JOYCE vs. MOORE.
 

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Where the damages claimed upon a covenant do not exceed ninety dollars, a Justice of the Peace has jurisdiction, although from the covenant itself it may not appear but that the damages would greatly exceed that amount.

### ERROR to the Chariton Circuit Court.

DAVIS & CLARK, for Plaintiff in Error, insist:

1st. That *prima facie* there is nothing due him in the face of said covenant or lease from defendant, but the \$30, for rent agreed to be paid.

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*Joyce vs. Moore.*

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2nd. The Court assumed, without proof, that the plaintiff sues for a breach of each and every covenant in the article sued on, and that the amount of damages claimed by him exceeds \$90.

3rd. The record shows no other amount claimed than the \$30 mentioned in the lease, and that determines the jurisdiction of the Justice of the Peace. See Rev. Stat. page —.

4th. No other Court has either original or concurrent jurisdiction of the subject matter of this suit, it being confided exclusively to a Justice of the Peace by the Statutes of this State.

*SHACKELFORD, for Defendant in Error, insists:*

1st. That in an action of covenant before a Justice of the Peace, the plaintiff must show that the damages claimed are within the jurisdiction of the Justice.

2nd. The filing a lease with several distinct covenants,—one to restore land, as the foundation of an action, does not give the defendant any notice what amount of damages are claimed. There must be a certain amount of damages claimed, that the Court may see that the amount claimed is within the jurisdiction. Rev. Stat. Justice's Courts, page 635, sec. 3. The plaintiff cannot after suit brought, waive or release any part of his demand in order to give jurisdiction. See Robinet vs. Nunn, 9 Mo. Rep. 246. A party cannot by parol, waive or release a covenant under seal. Nothing will discharge a covenant but performance, or a release under seal. Thomas vs. Cox, 6 Mo. Rep. 105.

3rd. The proper form of action in this case is an action of debt for rent in arrear, if the plaintiff claims only the rent in arrear, which forms an exception to the general rule, that whenever the action is founded on a deed, the deed must be declared on. See Garvey vs. Dobyms, 8 Mo. Rep. 213.

*SCOTT, J., delivered the opinion of the Court.*

Joyce sued Moore in a Justices' Court on a covenant for the payment of \$30 rent for the premises specified in the instrument, which also contained stipulations against the commission of waste, and for the restoration of the premises in good repair at the expiration of the lease. An account was filed with the Justice showing that the only damages claimed were those arising from the non-payment of the rent. From an informal statement of the Justice on his docket, it appears that there was a former trial between the parties in relation to the subject of the controversy, and that there was a verdict for the defendant, the action having been brought on an account and not on the covenant. Upon another trial in a subsequent suit, in which the covenant was the foundation of the suit, there was a judgment for the plaintiff, and the cause was afterwards taken by appeal to the Circuit Court, whence on motion, it was dismissed, because it did not appear but that the damages claimed exceeded ninety dollars.

Our statute gives Justices jurisdiction in actions of covenant, where the damages claimed, exclusive of interest, do not exceed ninety dollars.

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*Livengood vs. Shaw.*

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Whatever amount of damages could have been recovered, on this account, it is plain the account filed with the Justice, and copied into his docket, showed the breach for which the action was brought, which was the non-payment of the rent, a sum under ninety dollars. The law required the covenant to be filed with the Justice, it being the foundation of the action, and the account merely showed the amount of damages claimed, which was clearly within his jurisdiction. If there had been other breaches of the covenant at the time of the bringing of the suit, and the plaintiff failed to claim damages for them, he would be precluded from bringing another action for those damages. The rule being that where a party has several causes of action growing out of the same contract, or resting in matter of account which may be joined in the same action, they shall be joined; and if the cause of action be split up, and a suit brought for part only, and subsequently a second suit for the residue, the first action may be pleaded as a defence to the second. So where there are breaches of several covenants contained in one instrument, and a suit is brought for damages for some of the breaches, and subsequently a second suit is brought for damages claimed under other breaches, all of the causes of action being in existence at the beginning of the first suit, the first action may be used as a defence against the second. *Bendernagle vs. Cox*, 19 Wen. 207.

Without undertaking to determine (for the facts are not before us,) whether the former judgment for the defendant was a bar to the subsequent suit, it may be observed that such a question could not properly arise on a motion to dismiss. It was a defence to the merits to be established by the production of the Justices' docket on the trial. There was no legal evidence before the Court of such judgment, and if the facts stated informally in the Justices' docket should turn out to be true, it may well be questioned whether it would be a bar.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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*LIVENGOD vs. SHAW.*

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1. It is sufficient in an affidavit for an attachment to state that the defendant "is indebted," &c., omitting the word "justly."



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*Livengood vs. Shaw.*

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2. Amendments ought not to be permitted to pleas in abatement to the affidavit in an attachment, after being held bad on demurrer.

**ERROR to Jackson Circuit Court.**

**HICKMAN & WELLS, for Plaintiff, insist:**

1st. The affidavit is defective. It does not swear as to the proper point of time. It does not identify the debt. It does not say, it is justly owing.

2nd. The defendant's pleas are good, because the affidavit is bad; it relates to the existence of the facts necessary to furnish good reason.

3rd. The defendant ought to have had leave to amend his plea.

4th. The Court ought to have decided the motion to strike out counts.

5th. The judgment ought to have been arrested, because, three of the counts were inconsistent with the affidavit, and the verdict may have been for money, and not goods. The declaration is bad. The fourth count is bad.

**HAYDEN for Defendant.**

**McBRIDE, J., delivered the opinion of the Court.**

Benjamin Shaw brought his action of assumpsit against Samuel C. Livengood in the Jackson Circuit Court. The declaration contained two money counts, and one count for goods and chattels, horses, harness, &c., sold and delivered by plaintiff to defendant. At the date of the filing of the declaration, the plaintiff also filed his affidavit, upon which an attachment issued against the goods and chattels and real estate of the defendant, and which was subsequently levied by the Sheriff on some horses, harness, &c., as the property of the defendant: garnishees were likewise summoned.

On the return day of the process, the plaintiff asked and obtained leave of the Court to file an amended or new affidavit, thereupon the defendant filed his plea in abatement under the statute putting in issue the truth of the facts stated in the affidavit. R. C. 1845, p. 139, §25. To this plea the plaintiff filed a demurrer, which was sustained by the Court, and the defendant excepted. The defendant then moved the Court for leave to amend his plea in abatement, which the Court refused, and he excepted. He then filed his plea of non-assumpsit to the action. At some, perhaps, previous stage of the proceedings, the defendant filed his motion, or made a motion (the record states that there is no motion on file,) to dissolve the attachment, because the affidavit is

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*Livengood vs. Shaw.*

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insufficient, which motion was overruled by the Court, and the defendant excepted. The defendant then filed his motion to strike out the two first counts in the plaintiff's declaration, because the cause of action set forth in the plaintiff's affidavit is not applicable to those counts. This motion appears not to have been disposed of by the Court. At a subsequent term, a trial was had, which resulted in a verdict and judgment for the plaintiff, whereupon the defendant moved in arrest and for a new trial, which having been overruled by the Circuit Court, he excepted, and has brought the case here by writ of error.

The first question in the regular order of proceedings, presented by the record, is as to the sufficiency of the amended affidavit filed by the plaintiff. The motion made by the defendant on this point not being in the record, we are unable to know upon what grounds, or for what reason he asked the Court to declare the affidavit bad and insufficient. A party asking the action of the Court, upon a question presented by himself, should set out fully and clearly the reasons upon which he predicates his application, as it is upon those alone the Court is presumed to act. Other causes may, in truth, exist, and escape the vigilance of the Court, unless the counsel point them out, and a reversal for such cause would not comport very well with the spirit of the thirty-second section of the act to regulate practice in this Court, (R. C. 1845, p. 906,) which provides that "no exception shall be taken in an appeal or writ of error to any proceedings in the Circuit Court except such as shall have been expressly decided by such Court."

It may be urged, however, that the Court has directly decided that the affidavit is sufficient by overruling the defendant's motion to quash, but the practice of the Courts is to require parties making motions, to do so in writing, and to set down their reasons. If in doing this the party assigns errors which do not exist, either in law or in fact, the Court might very properly overrule the motion, and in so doing, could only be said to have decided upon the sufficiency of the reasons set forth in the motion, and correctly decided, notwithstanding there might be substantial defects in the affidavit. A party should truly set out his reasons in his motion, otherwise the reasons set out may withdraw the attention of the Court from the defects that really exist, thereby superinducing an oversight, and mislead the Court.

But waving these considerations for the present, we will direct our attention to the supposed defect in the affidavit, to which we have been directed by counsel here.

The affidavit alleges that the defendant is *indebted*, &c., omitting the

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*Livengood vs. Shaw.*

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word *justly*, as prefixed in the statute to the word *indebted*. The only difficulty which we have in the construction of this statute arises out of the fact that the proceeding has been considered a summary one in derogation of the common law, and therefore should be strictly construed; or in other words, it should be construed most favorably for the benefit of the debtor, and that the creditor should bring himself fully within the requisitions of the law before he is entitled to the benefit of its provisions. Whilst the Courts have been thus disposed to restrict and circumscribe the remedy given by the statute, it has continued from its first enactment to grow and increase in legislative favor, and so frequent has the practice become in the country to sue by attachment, that it may now be considered quite a common remedy for the collection of debts.

Such being the facts, it would appear to be the duty of the Court to continue the legislative will, so as to give it effect, and at the same time promote the ends of justice. Acting under this principle we see no sufficient reason justifying us in the belief that it was intended by the Legislature, in the use of the word *justly*, to qualify the term *indebted*. According to the common legal acceptance of the term *indebted*, it means *justly* indebted, legally indebted, indebted according to law; and the superadding of the term *justly* does not therefore qualify or restrict the word *indebted*. If we are correct in this, then the omission of the word *justly* is not material, and does not render the affidavit defective.

Did the Court err in refusing leave to the defendant to amend his plea in abatement to which a demurrer had been sustained? It is suggested that the plea authorized by the statute (R. C. 1845, p. 139, §25,) is not strictly a plea in abatement, but is what the statute denominates it, *a plea in the nature of a plea in abatement*. If the plea partakes of the essence, essential qualities or attributes of a plea in abatement, there is no reason why it should not be governed by the same principles, subject to the same rules, and liable to the same consequences. If not so classified, we should be at a loss to know where to put it, how to regard it, or by what rule of pleading it is to be regulated. It must then be regarded as a plea in abatement, and being adjudged bad on demurrer, the Court properly refused leave to amend it.

The next point for consideration is the failure of the Circuit Court to dispose of the defendant's motion to strike out the two first counts in the declaration. These were money counts. The affidavit charged the indebtedness of the defendant to be for goods and chattels, sold and delivered by the plaintiff to the defendant, and were, therefore, inapplicable to the money counts, and the Court should have stricken them out.

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*Broadwater vs. Darne.*


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But it is not perceived that the defendant has sustained any injury by the omission of the Court. The bill of particulars furnished by the plaintiff set out the cause of action, and the evidence was directed exclusively to the indebtedness therein specified. The omission might have been remedied if it had been discovered in time by a finding for the defendant on the two first counts, but we consider it more a matter of form than otherwise, and not of sufficient importance to authorize us to disturb the judgment.

These being the principal points presented, and not being found for the plaintiff, the judgment of the Circuit Court will be affirmed. Judge NAPTON concurring herein, the judgment of the Circuit Court is affirmed.

Judge SCOTT not sitting.

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 BROADWATER vs. DARNE.

1. Replevin will not lie for an injury to the bare possession of property—there must be a general or special property.
2. Drunkenness does not render a contract void. It only authorizes the party, or his representatives, to avoid it.
3. Although parol evidence is not admissible to alter or impeach a bill of sale of slaves, yet such evidence is admissible to shew that in pursuance of an understanding between the parties at the time of the obtaining the bill of sale, the slaves had been subsequently given, and possession of them delivered, so as to shew title in the donee.

## ERROR to Callaway Circuit Court.

LEONARD & HARDIN, for *Appellants*.

1st. The action of replevin is a proceeding *in rem*, and cannot be maintained unless the defendant be in possession of the property sought to be replevied at the commencement of the suit. 1 Chit. Plead. 185, §2, title "Replevin." Rev. Stat. title "Replevin." Doe, ex'r Ray, vs. Huntingdon, 6 East. Reps. 286. Sharp vs. Whittenhall, 3 Hill's Rep. 576.

2nd. The testimony offered by the defendant on the cross examination of plaintiff's witness, Thomas J. Minor, and rejected by the Court, was improperly excluded.

The gross inadequacy of the price, the fact that even this sum was only nominally paid, and that after the pretended sale, Broadwater denied to the plaintiff that he had ever sold him the slaves, and that plaintiff assented to this, taken in connection with the direct evidence that Broadwater was intoxicated when he signed the bill of sale, are all circumstances to show that the conveyance was obtained from a man deprived by drunkenness of the capacity of managing his affairs, while

*Broadwater vs. Darne.*

the implied admission of plaintiff, that he never bought the slaves from Broadwater, was a direct contradiction of the fact upon which he relied for his title to the property.

3rd. The testimony of Mrs. Whaley, which the defendants offered and the Court rejected, ought to have been received.

Although not sufficient of itself to establish that plaintiff, after his brother-in-law's death, had surrendered to his sister and her children, this right to the slaves that he had acquired by the bill of sale, it was legal evidence for that purpose; it showed him to be under the strongest moral obligation to restore the slaves to his widowed sister and her children—and when taken in connection with his acknowledgement that the slaves belonged to them and not to him, was almost conclusive evidence of the fact.

4th. The evidence of John Scott, of plaintiff's acknowledgement that the slaves belonged to the defendant and her children, ought not to have been rejected.

The principal question in the issue was whether the slaves were the property of the plaintiff, and the plaintiff's direct admission that they did not belong to him, was here excluded.

5th. The plaintiff's 6th and 16th instructions are erroneous;—although one be in the peaceable possession of property and another wrongfully dispossess him, yet the first possessor cannot without right to the property, recover the possession from the wrong doer, by replevin,—to this action, property in the defendant, or even in a stranger, has always been a good plea, but if the plaintiff's doctrine be correct, it is no bar in all that class of cases where there has been a wrongful taking. *Butcher vs. Potter*, 1 Salk. 93. *Harrison vs. McIntosh*, 1 John. Rep. 380—384. *Rogers vs. Arnold*, 12 Wend. Rep. 30. *Prosser vs. Woodward*, 21 Wend. Rep. 205. *Ingraham vs. Hammond*, et al. 1 Hill's Rep. 339. *Sharp vs. Whittenhall*, 3 Hill's R. 576. *Brown vs. Webster*, 4 New Hamp. Reps. 500. *Whitwell vs. Wells*, 24 Pick. Rep. 25.

6th. The plaintiff's 9th and 11th instructions are also clearly erroneous.

7th. A contract entered into by a party so intoxicated as to be incapable of managing his affairs, is void, and the defendant's 3rd instruction ought to have been given. *Chit. on Contracts*, 139. *Story on Contracts*, 17 and 18. *Fenton vs. Holloway*, 1 Stark. Rep. 126. *Pitt vs. Smith*, 3 Camp. R. 33. *Williams vs. Inabit*, 1 Bailey's South Carolina Rep. 343. *Reynolds vs. Waller*, 1 Wash. Virginia Rep. 164. *Arnold vs. Hickman*, 6 Munf. Rep. 17.

8th. The defendant's 4th and 5th instructions ought to have been given.

9th. Fraud avoids all acts, and gross inadequacy of price is evidence of fraud, and upon this ground the defendants were entitled to their 6th and 7th instructions. *Fermor's case*, 3 Co. Rep. 77. *Borden vs. Fitch*, 15 John. Rep. 144.

10th. Under our statute, the defendant's plea put the plaintiff upon proof of his title to the property, and therefore the Court ought to have given the defendant's 8th instruction.

11th. The defendants 9th and 10th instructions assert what is admitted to be law, and there was evidence before the jury either of a gift or a sale of the slaves to the defendants, one or the other, and whether it was sufficient or not, was for the jury and not for the Court to decide.

**TODD, ANSELL & SHELEY, for Defendant, insist:**

1st. That the action of replevin to recover possession of property will lie when the right to it is immediate, and if such right is proven, a perfect title to the property is not requisite. See Revised Code, title "Replevin."

2nd. The defendants to impeach the title presented by deed and delivery under it to plaintiff, must show themselves or one of them to claim as creditors to the maker, or as purchaser from the maker, or a personal representative as administrator, &c., or to have had paramount title before date of deed. *Osborne vs. Moses*, 7 Johnson R. 161. 4 Bibb, 65, 70. 16 John. 189. 1 Story, sec. 371. 2 Littell, 12. Statute, title, Fraud, Conveyances.

3rd. That a tortious taking or detainer, without either of such titles, forbade the defendants from any defence against the deed of plaintiff so as to permit a recovery by them on the score of



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title or possession. 7 Johnson, 140. 3 Wend. 280. 14 John. Rep. 84. 8 John. Rep. 432. 1 Wend. 109. Marshall vs. Davis, 12 Wend. 30. Rogers vs. Arnold, 3 Hill, 348. Barrett vs. Warren, 1 Hill, 302. Ash et al. vs. Putnam.

4th. The sale of the negroes from Broadwater to Darne, being evidenced by deed, it cannot be impeached, changed, explained or contradicted by parol evidence. 2 Starkie, 544. Title "Parol Evidence," and notes. Morris vs. Morris, 2 Bibb, 311. Cozens vs. McGee, 2 Bibb, 321. Greenleaf's Evidence, title "Parol," 327. See Rev. Statutes, Frauds, &c. Parol evidence can only be introduced to show fraud in the execution of the instrument. Inadequacy of price is not sufficient to avoid a deed. 1 Story, sections 244 to 7. Chitty on Contracts, 7 and 8. Burrows and another vs. Alter and another, 7 M. R. 434. Dorr vs. Munsell, 13 John. R. 430. Dale vs. Roosevelt, 9 Cowen, 307. 1 Littell, 62. Chitty on Contracts, (new ed.) 412.

5th. To avoid a deed on account of drunkenness of maker, he must have been so drunk at the time of the execution of the deed, that he did not know what he was doing. 1 Story, section 230 to 232, and notes. 2 Kent's Com. 452, and notes. Campbell vs. Ketchum, 1 Bibb, 406. 6 Munford Rep. 15. 8 Vesey, 12. 2 Starkie, 326, title "Drunkenness."

6th. The defendants are mere trespassers without color of title, and the verdict is for the right party, and this Court will not reverse for error committed by Court below.

*Scott, J., delivered the opinion of the Court.*

This was an action of replevin for six slaves, instituted by Darne against Margaret Broadwater and her son J. S. Broadwater, (the appellants,) in the Callaway Circuit Court, in September, 1844. The declaration contained two counts, one for an unlawful taking, and the other for an unlawful detention of the slaves. The cause was tried upon the general issue at the April Term, 1845, when the plaintiff (the appellee,) had a verdict and judgment, from which the defendants have appealed to this Court.

Upon the trial, the plaintiff claimed the slaves under a bill of sale, dated in Virginia on the 25th February, 1825, from Wm. E. Broadwater, the husband of Margaret Broadwater, and father of John S. Broadwater, the defendants and appellants, purporting to have been given in consideration of \$400 paid by the plaintiff, and gave evidence that Wm. E. Broadwater resided in Virginia until 1830, when he died; that Margaret Broadwater, who was the plaintiff's sister, went with her children to reside with him in 1825, after the execution of the bill of sale; that in 1833, she and her children removed with the plaintiff to this State, and resided with him until 1840, when they went to reside on a farm by themselves, taking with them some of the slaves embraced in the bill of sale. It was proved that the slaves went to, and remained with Darne after the execution of the bill of sale, and that his possession continued. Margaret Broadwater resided with her brother until 1840; the slaves in controversy were in possession of Darne until about the 1st May, 1844.

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when they left his service and were found at the house of Mrs. Broadwater. The Sheriff testified that in May, 1844, a search warrant was placed in his hands by Darne, the plaintiff, to search for the slaves sued for on the farm of Mrs. Broadwater. That he went and found the slaves in Mrs. Broadwater's house, above stairs, and brought them to the Court House of Callaway County, before Squire Overfelt, by whom the search warrant had been issued—that the search warrant was dismissed, and then a writ of replevin was put in his hands, and was served on the negroes at the Court House; he took the slaves to his house, where they now are and have been—the defendant, J. S. Broadwater, his mother being from home, delivered up the slaves under the search warrant. Darne and his counsel informed the Sheriff that they did not like the first writ of replevin, and that they would dismiss it and issue another. The first writ was served on the 3rd June, 1844, and was dismissed on the 16th September following; on the next day a second writ was placed in his hands, and it was served on the slaves then in his possession.

Upon the cross examination of one of plaintiff's witnesses, the defendant offered to prove that the \$400, pretended to have been paid for the slaves embraced in the bill of sale, was not one-fourth of their value,—that the plaintiff never paid this consideration, and that some time after the execution of the bill of sale, Broadwater declared in plaintiff's presence that he had never sold him the slaves, to which the plaintiff assented. This evidence was objected to by the plaintiff, and rejected by the Court, to which exceptions were taken.

The defendants then went into their case and offered in evidence the deposition of Mrs. Whaley, and read from it evidence that she saw plaintiff on his way to Broadwater's; that he said he was going there after Broadwater's slaves—and that she saw him again on his return home with the slaves in Broadwater's wagon, with their beds, clothing, &c.—That two or three weeks afterwards, Mrs. Broadwater went to the plaintiff, and after a short time returned again to her husband. That some of the slaves were then with her, and under her control, and others of them were hired out;—that Mrs. Broadwater lived with the plaintiff from August 1825 till 1840, and acted as his house-keeper, and that plaintiff generally consulted with her about hiring out and disposing of the slaves in controversy. The defendant then offered to read from this deposition evidence that the plaintiff informed deponent that his sister, Mrs. Broadwater, told him, when she was down in the District of Columbia, (where he resided,) that her husband was scarcely ever sober,—that he managed his business so badly that she was afraid that she and

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her children would come to want;—that he advised her to go home and make some arrangement with her husband, to have the slaves secured to her and her children, and to write to him if she could affect any thing; that she did write, and he borrowed \$400, and purchased the slaves with it; that he, and Mr. and Mrs. Broadwater talked the matter over, and it was agreed that the plaintiff should take the slaves and keep them for the benefit of Mrs. Broadwater and her children; that the bill of sale was accordingly executed, and plaintiff got back his money, Mrs. Broadwater placing it where he could get it, and that he exchanged this money for other money, so that Mr. Minor, from whom he had borrowed it, might not recognize it. This evidence was excluded by the Court, and exceptions were taken.

The defendants then introduced John Scott as a witness, and gave evidence by him, that the plaintiff, some time in 1825, and shortly after the execution of the bill of sale, told witness that Broadwater was not sober when he executed it, that he was always drunk, and that there was no such thing as doing business with him. Broadwater lived fifty or sixty miles from the District of Columbia, and had but few slaves—that in August, 1825, Mrs. Broadwater and her children went to reside with plaintiff, and continued with him until 1840—that she and plaintiff frequently consulted with one another about the slaves.

The defendant asked this witness what plaintiff said to him after the execution of the bill of sale in relation to the ownership of the slaves, which was rejected,—they then asked the witness whether the plaintiff at any time after the execution of the bill of sale, told witness to whom the slaves belonged, which was also rejected. They then offered to prove, by the witness, that the plaintiff acknowledged to him, after the execution of the bill of sale, that the slaves in controversy belonged to the defendant and her children, which was also rejected.

Testimony of a like character to the foregoing, from other witnesses, was also offered and rejected by the Court.

The plaintiff then offered the sixteen following instructions:—

1st. If the jury believe from the evidence that W. E. Broadwater executed and delivered the bill of sale for the slaves mentioned therein read in evidence, to hinder, delay or defraud the creditors of said Broadwater, then said bill of sale is binding and obligatory on said W. E. Broadwater, his heirs, and distributees.

2nd. If the jury find from the evidence that Wm. E. Broadwater made, executed and delivered the bill of sale given in evidence, and that the slaves therein mentioned were delivered up to the possession of Simon

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Darne under said bill of sale, then said bill of sale is to be taken as containing the true contract between Broadwater and Darne, and it is not competent for the defendants in this action to vary, alter or contradict the terms of said bill of sale by parol evidence.

3d. If the jury find from the evidence that Wm. E. Broadwater, previous to and at the time of the execution of the bill of sale, given in evidence, was the owner of Prince, and also of Judy, and that the plaintiff received the possession of said slaves, and held them under a claim of right from said Wm. E. Broadwater, and that while he held them, Fanny, Jim, Joe and Murry were born, children of said Judy, and that Wm. E. Broadwater, during Darne's possession, died intestate, then the defendants had no right by law, as the heirs and distributees of said Wm. E. Broadwater, without administering on his estate, to take possession of the slaves in controversy, without and against the knowledge or consent of the plaintiff.

4th. To avoid the bill of sale given in evidence, on the alleged ground of Wm. E. Broadwater's drunkenness, at the time of its execution, the jury must be satisfied from the evidence that the alleged drunkenness existed at the time of the execution of said bill of sale, and incapacitated him from understanding and doing his ordinary business.

5th. That if the jury find that Wm. E. Broadwater was drunk when the bill of sale to the plaintiff was made, yet, if afterwards he affirmed the sale of the negroes while sober, it is no cause to invalidate such sale.

6th. If the jury find from the evidence that the plaintiff, prior to the suit, was in peaceable possession of the slaves in controversy, and afterwards the defendants, or either, disturbed that possession, by tortiously taking the slaves into their possession, without the plaintiff's consent, and withheld the slaves from the plaintiff at the time of bringing this suit, they will find for the plaintiff.

7th. If they so find, they may give for damages for the loss of the services of the slaves from such taking to this time.

8th. Although the jury may give simple damages for the loss of service of the slaves, they may further give exemplary damages for the tort and wrong committed.

9th. If the jury find that the plaintiff held possession of the slaves, under Wm. E. Broadwater, with his consent, and he owned them before delivery to the plaintiff, and he died before the tort of the defendants, they cannot in this suit, under any claim of right under Broadwater, as his representative, deny the execution of the bill of sale to the plaintiff,

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they neither being executor or administrator of said Broadwater, deceased.

10th. If the claim of defendants to the slaves is derived from Wm. E. Broadwater, under the contract of sale to the plaintiff, then they cannot deny the execution of the instrument.

11th. If the claim of the defendants is adverse to the plaintiff, and they claim under a good title to them, in William E. Broadwater, before his death, then they must prove a contract of gift or sale to them, from Broadwater, deceased, or the plaintiff in writing, or a parol contract of gift or sale from one of those parties, and an actual delivery under such contract, to defeat the plaintiff's recovery.

12th. There is no evidence in this cause that they, the defendants, are creditors of Wm. E. Broadwater, so as to enable them to impeach the plaintiff's bill of sale.

13th. There is no evidence in this cause that the defendants are purchasers from W. E. Broadwater, after or before the plaintiff's bill of sale from Broadwater, and they cannot on that ground impeach the execution of the plaintiff's bill of sale.

14th. There is no evidence in this cause that the defendants are such personal representatives of Wm. E. Broadwater, deceased, as to be allowed in this cause, on such ground, to impeach the plaintiff's bill of sale.

15th. There is no evidence in this cause that the plaintiff, after his purchase of Wm. E. Broadwater, by deed in writing, gave or sold the slaves in suit to the defendants, or either, neither is there any evidence that after such sale, he, by a parol sale or gift of them, or any of them, delivered under it to the defendants, or either of them, any of the slaves in dispute.

16th. If the jury find a tortious taking of the slaves in question by the defendants, or either of them, from the plaintiff, from his peaceable possession, they cannot defend themselves under this action under any title, but are bound to restore the possession, and set up such claim by the usual legal remedies, and cannot justify their possession by their own tortious taking and withholding the possession from the plaintiff.

All of which were given, but those numbered 10, 12, 13, 14, and 15, to the giving of which the defendants excepted.

The defendants then asked the ten following instructions:

1st. If the jury believe, from the evidence, that neither of the defendants were in the possession of the slaves sued for, or any of them, at the commencement of this suit, that the jury ought to find their verdict for the defendants.



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2d. That the plaintiff cannot recover in this action unless the jury are satisfied from the proof, that the plaintiff, at the commencement of this suit, was entitled to the possession of the slaves sued for, and that the defendants wrongfully took them from the plaintiff, or wrongfully detained them from him.

3d. That if the jury believe that Wm. E. Broadwater was so drunk, at the time of his executing the alleged bill of sale, given in evidence by the plaintiff, as to be incapable of managing his affairs, that the sale is void and of no effect, and transferred to the plaintiff no right to the slaves or to the possession thereof.

4th. If the jury believe from the evidence that the plaintiff, after the alleged execution of the bill of sale, given in evidence by the plaintiff, abandoned to Margaret Broadwater, or her children, the title thus acquired, that in that event the jury ought to find for the defendants, unless they believe the plaintiff afterwards acquired a new title from Mrs. Broadwater, or her children, or those claiming under them.

5th. That it is the province of the jury to determine, from all the evidence before them, whether the plaintiff did, in fact, abandon to Mrs. Broadwater, and her children, all right to the slaves in controversy, acquired under the alleged bill of sale.

6th. If the jury believe from the evidence that the alleged bill of sale was obtained by the plaintiff, from Wm. E. Broadwater, by fraud, the same is void, and vested no title to the slaves in the plaintiff.

7th. Gross inadequacy of price is one circumstance, if the jury believe it exists in the alleged sale, by Wm. E. Broadwater to the plaintiff, from which with other circumstances they may infer that the said sale was fraudulent and void as against Wm. E. Broadwater.

8th. The plaintiff cannot recover in the present action without showing to the satisfaction of the jury, a right to the slaves sued for at the time of the commencement of this suit, even although they may believe that the title is not in the defendants.

9th. A sale of slaves is valid without any deed, bill of sale, or other writing evidencing the same.

10th. A gift of slaves is valid without any deed or other writing evidencing the same, provided such slaves came to the possession of the donee, and it is the province of the jury to determine from all the evidence whether there was any such gift.

All of which were refused by the Court, but that numbered two, to which the defendant excepted.

The first question raised is as to the right of the plaintiff, in replevin,

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to maintain his action against one who is not in the possession of the property to be replevied. In the case of *English vs. Dulbrow*, 1 Miles 100, it was held that in replevin the writ should issue against the person having at the time the actual possession of the goods claimed. In *Bacon* 5, 71, it is said that if one takes beasts by the command of another, the replevin may be brought against him who actually takes, or the commander only, as trespass may be. So in *Leigh's Nisi Prius*, it is laid down that the action of replevin lies as well against the party who directs the taking of the goods as against the party who has actually taken them; or against both of them jointly. 2, 1325. What is the effect of such a defence? The simple denial by a defendant that he did not take or did not detain the property of the plaintiff, laying aside all considerations of ownership in himself, would be nothing more than the finding of the issue of *non cepit* at common law in his favor; if nothing more appeared in a case, that would not entitle a party to a return of the property. If, on a trial, under the issue prescribed by our statute, the defence should simply be that the property was not taken nor detained by the defendant, and no evidence was given of any property or right to the possession in him, and the plaintiff should be defeated in his action by such a defence, would the Court award a return of the property, or an assessment of damages, in such a case? Would not such a defence be tantamount to a disclaimer of all ownership or right to the property?

The 6th and 16th instructions are complained of as giving incorrect views relative to the nature of the interest in property necessary to maintain the action of replevin. The books say that replevin will lie where trespass *de bonis asportatis* lies. In *3d Hill, Sharp vs. Whittenhall*, 576, it is said that this rule is not universally true. Possession is *prima facie* evidence of the ownership of personal property, and will enable one to maintain an action for an injury to such property when no better right is shown. The possessor is deemed the owner, and that presumption stands for him against all the world until the right of another is shown. It would seem that the bare possession of property, without right, will not support replevin. How can the defence of property, in a stranger, prevail if a bare possession alone will support the action? It is not pretended that an action will not lie for an injury to one's possession, or that the law confers no protection upon such rights. All that is intended to be said is, that replevin will not lie for an injury to the bare possession, when the property is shown to be in another. There must be a right to the possession, coupled with a special or general property.

Mrs. Broadwater does not claim the slaves in privity to her husband;

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she is not his administratrix or his executrix; she has not shown herself in a situation to entitle her to avoid the contracts of her husband, neither is she a creditor or purchaser; the instructions concerning drunkenness are beside the case; drunkenness does not render contracts void, so that the world may avail itself of it as a defence; it only makes them voidable, and the defence can only be set up by the party himself, or his representatives. Story on Contracts 18. Then there could be no error in giving or refusing instructions on this subject; evidence of the fact was properly admitted, on account of its importance in establishing the right set up by Mrs. Broadwater; but she has no right to insist on it as avoiding her husband's contracts.

There is no doubt about the correctness of the general principles contended for by the counsel of the appellees, that parol evidence is inadmissible to vary a written instrument, or to impeach the consideration of a sealed instrument; but these principles will not warrant the exclusion of the evidence of which the appellants complain. It is only necessary to state the foundation of Mrs. Broadwater's claim to the slaves in order to be convinced of the propriety of such evidence; with the weight of that evidence this Court has nothing to do, its relevancy is our only concern. Mrs. Broadwater, being apprehensive of coming to want from the dissipated habits of her husband, consulted with her brother as to the means by which she could save some of his property for herself and children; it was advised that her brother should obtain a bill of sale for the slaves in his own name; that is accordingly done; the consideration expressed bears but little proportion to the value of the slaves, and the sum pretended to have been paid is placed so as to enable the purchaser to obtain it again, so that, in fact, nothing was paid for the slaves; the slaves are delivered to Darne, and his sister with her children, go to live with him. Now, the object of Mrs. Broadwater is to show that her brother has done that which, as she supposed, he ought to have done; that he has given her the slaves; that he surrendered to her the legal title vested in him by the bill of sale, and that he had abandoned the ownership to her; for this purpose all the evidence excluded by the Court was proper, and its exclusion is error. In case of a sale of a slave or a gift, where possession accompanies it, no writing is necessary. The veil may not be entirely lifted from this transaction, but from what appears of it, by the record, I do not think the conduct of Mrs. Broadwater very censurable; she was prompted by the strongest feeling of her nature, love for her offspring, to secure something for them from the fate which the unfortunate habits of her husband threatened his estate. If a pious

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fraud can be committed, that surely was one. This evidence, under this view of the subject, was admissible; with its weight we have nothing to do; whether it made out the plaintiff's claim, was a question solely for the jury.

This is not a case in which the Court can take upon itself to say that the judgment is for the right party; that may be, but as it was a case for the jury, and as evidence offered by the plaintiffs, tending to make out claim, has not been weighed nor considered, we think it proper that an opportunity be afforded them for that purpose.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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COCKRILL vs. OWEN.

1. The recognizance for an appeal from the judgment of a Justice, is strictly a recognizance, and not a penal bond, nor must breaches be assigned in a suit upon such an instrument.
2. Justices of the Peace have jurisdiction in actions upon such recognizances.
3. If upon the trial of an appeal in the Circuit Court, judgment be rendered against the appellant, but not against his security on the recognizance, an action upon the recognizance is not barred by such omission.
4. If a Justice fail to approve and attest a recognizance for an appeal, it is void.

**ERROR to Platte Circuit Court.**

**STRINGFELLOW for Plaintiff.**

- 1st. That the recognizance for the appeal being a record—the plea of *non est factum* was a nullity.
- 2nd. Its alteration by the Justice did not affect it.
- 3rd. The Justice had jurisdiction.

**HAYDEN, for Defendant.**

The counsel for defendant in error will insist upon the following points, and rely for their support upon the following authorities:—

- 1st. That the Justice of the Peace had no jurisdiction of this case, for two reasons: first, because the bond is a penal bond, and required breaches of the condition to be assigned; and because the said Owen was a party before the Circuit Court as security in said bond when

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the appeal was adjudged against Knighton, the principal therein,—and that by that judgment the said Owen was and is discharged from liability. See 7th Mo. Reports 264, Wimer vs. Brotherton.

2nd. That the bond was void and not binding on Owen, for two reasons: first, because the same was erased and interlined by the Justice of the Peace without the consent of said Knighton or Owen; and second, because the same was not approved or attested by the Justice of the Peace. See 7 Mo. Reps. 572. Briggs, &c. vs. Bryan, and authorities referred to.

SCOTT, J., *delivered the opinion of the Court.*

This was an action commenced by Cockrill in a Justices' Court against Owen, on a recognizance of appeal. The recognizance was for the sum of sixty dollars. The cause was taken by appeal to the Circuit Court, where on a trial *de novo* the plaintiff took a non suit.

The Justice who took the recognizance of appeal on which the suit was brought, testified that it was handed to him executed out of his office, and was payable to J. V. Cockrill, the plaintiff, in the suit in which it was taken. He took the recognizance to his office, and on looking at it, thought it ought to have been made payable to the State of Missouri, and erased the name of Cockrill, and interlined over it the words "the State of Missouri,"—that he returned the instrument so altered as the recognizance of appeal, and sent up the appeal. Knighton and his surety, the defendant in this suit, both acknowledged it to him as their recognizance as first taken, in a conversation with them after the same was filed. The recognizance was not tested by the Justice. When the appeal was tried in the Circuit Court in which the recognizance was taken, on which this suit is brought, judgment was rendered against the appellant only, and not his surety, Owen.

The cause was tried in the Circuit Court on the plea of *non est factum*, and the following points were made, namely: 1st. That the alteration of the recognizance by the Justice deprived it of all legal efficacy. 2nd. That it never took effect for the want of an attestation by the Justice. 3rd. That the Circuit Court should have rendered judgment on the recognizance when judgment in the appeal suit was rendered in which the recognizance was taken. 4th. That the instrument sued on was a bond, and required the assignment of breaches, and therefore the Justice had no jurisdiction.

Convenience will be promoted by considering, first in the order of time, the point last raised.

The statute makes the instrument executed by the appellant and his surety, in order to obtain an appeal from a Justice to the Circuit Court,



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a recognizance, it is in form a recognizance. It is competent for the Legislature to authorize any officer to take a recognizance. Any thing may be made a recognizance by statute, and what policy is subserved, or what interest promoted in treating an instrument as a bond in a suit upon it, which the Legislature expressly declares shall be a recognizance? The instrument being a recognizance, the plea of *non est factum* was inappropriate in an action upon it; when the validity of such an instrument is denied it should be by a plea of *nul tiel record*.

This, then, being a recognizance, is not within the statute regulating actions on penal bonds. *People vs. Relyea*, 16 Johns. 153.

It would seem that recognizances of appeal are like bail bonds, replevin bonds, and some others which have been held not to be within the statute requiring the assignment of breaches on penal bonds; but the Courts in such cases have invariably given relief to the defendant without his being compelled to file a bill in equity. 1 Saun. 58, note, a late edition; 3 Wend. 60. Or such relief may be considered within the equity of the statute of 4 Ann. ch. 16, §12, and from which our act was taken. Rev. Code, 781. *Lansing vs. Capon*, 1 J. C. 617. If the judgment had been entered on the appeal in the Circuit Court, it would have been regulated by the condition of the recognizance, and should it not be in an original action on the instrument? Courts, therefore, in actions on a recognizance of appeal, will enter judgment for the penalty and give relief to the plaintiff according to the condition of the recognizance.

Although judgment might have been entered on the recognizance on the trial in the Circuit Court, yet that does not seem to be the sole remedy. The condition of the recognizance shows that there may be cases, in which the remedy cannot be employed. By the common law, debt and *sciri facias* were concurrent remedies on all recognizances. When the Legislature creates such instruments, those remedies tacitly attach to them, and although another may be given, there is no principle on [which] they can be denied. The law is harmonized by regarding the remedy given on the trial of the appeal as merely cumulative. Had there been evidence that the matter had been adjudged in the Circuit Court, different considerations may have arisen. The *exceptio rei judicatæ* might then have applied. But there is no such evidence.

As to the alteration of the recognizance by the justice. Notwithstanding the alteration, the record is still legible, and that renders a recourse to secondary evidence unnecessary. Had an alteration been made in a bond by a stranger, though in a material part, it would not have affected

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it ; nor would it in a record. Greenleaf, speaking on this subject, says a distinction is to be observed between the alteration and the spoliation of an instrument as to the legal consequences,—the term alteration is at this day usually applied to the act of the party entitled under the deed or instrument, and imports some fraud and improper design on his part to change its effect, but the act of a stranger without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation so long as the original writing remains legible ; and if it be a deed, any trace remains of the seal. If by the unlawful act of a stranger the instrument is mutilated or defaced so that its identity is gone, the law regards the act so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary. 632.

Another question is, whether the omission of the Justice to test the recognizance, affected its validity. Formerly, appeals were dismissed for a defective recognizance, and there was no authority in the Circuit Courts to hold on to them and require the recognizance to be perfected. The appellee has it now in his power to have any recognizance perfected which is in any ways defective. Yet, under the old law, the Court required the recognizance to be tested by the Justice. In the case of *Nichols vs. The Circuit Court of St. Louis County*, 1 Mo. Rep. 254, the Court put the failure by a Justice to attest a recognizance on the same ground with an omission to sign it by the parties, and held that an appeal was rightly dismissed because a recognizance was not signed by the parties ; so in the case of *Byrne vs. Thompson*, 1 Mo. Reps. 315, which was the case of an appeal from the County to the Circuit Court ; the appeal was dismissed because the bond was not approved as required by law. See the case of *Adams vs. Wilson*, decided at this term. As this was a trial on an appeal from a Justices' Court, where no formal or written pleadings are required ; and as the parties went to trial by agreement on the plea of *non est factum*, and as this point was raised in the Court below, we do not consider that there is any thing contained in this opinion which prevented the defendant from availing himself of it.

What has been said in relation to the relief afforded by Courts in suits on recognizances of appeal, was said after a full deliberation of the case of *Steinback vs. Ex'r of Lisa*, 1 Mo. Rep. 163.

The other Judges concurring, the judgment of the Court below will be affirmed.

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*Markley vs. The State.*

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## MARKLEY vs. THE STATE.

1. An indictment for dealing with a slave, should allege such dealing to have been without the consent of the "master, owner, or overseer." It is not sufficient to lay it without the consent of *one only*.
2. An indictment, laying an offence on a future or impossible day, is defective.

## ERROR to Pike Circuit Court.

BROADHEAD *for Plaintiff in Error.*

- 1st. The indictment should negative the idea of a written permission from the master, owner, or overseer of the slave. Rev. C. 1845, p. 1018 §33; 8 Mo. Rep. 210.
- 2d. The indictment is bad, because the time "one thousand, *eighteen* hundred and forty-six," is impossible. See Chitty's Crim. Law p. 225.

McBRIDE, J., *delivered the opinion of the Court.*

Markley was indicted at the April term of the Pike Circuit Court, 1846, for dealing with a slave, without permission of the owner of said slave. At the September term of the Court a trial was had, verdict of guilty found, and a fine of \$20 assessed against the defendant, on which the Court entered judgment; thereupon, the defendant moved in arrest of judgment, assigning as reasons therefor:—

1st. Because it is not charged in any one of the counts in said indictment, that said Markley dealt with the slave mentioned in said indictment, without the consent in writing of the master of said slave.

2d. Because it is not averred in any of the counts in said indictment, that said Markley did deal with the slave Charles, mentioned in said indictment, without the consent in writing of the overseer of said slave.

3d. Because it is not averred in either of the counts in said indictment, that said Markley did deal with the slave without the consent, in writing, of the master, owner, or overseer of said slave.

4th. Because the indictment is in other respects illegal and defective.

5th. Because the time alleged in said indictment is impossible.

Which motion having been overruled, the defendant excepted and has brought the case here by writ of error; and now assigns for error the refusal of the Circuit Court to sustain his motion in arrest of judgment, for the reasons set forth therein.

*Markley vs. The State.*

The indictment charges that "the grand jurors, &c., present that John S. Markley, on the 1st January, in the year of our Lord, *one thousand eighteen hundred and forty-six*, &c., did deal with a certain slave called Charles, belonging to one Fountain Edwards, he, the said Markley, not having first obtained from him, the said Edwards, a consent in writing to deal as aforesaid, with said slave, contrary," &c. The other three counts are of the same import, except the third, which further alleges that Edwards, *as owner* of the slave, did not consent in writing.

The indictment is founded on §33, art. 1, of Rev. C. 1835, p. 1018, which provides that any person who shall buy of, sell to, or receive from any slave any commodity, whatsoever, without the consent in writing of the master, owner or overseer of such slave, first had and obtained, or who shall deal with any slave without such consent, shall forfeit to the master, owner or overseer of such slave, four times the value of the commodity so bought, sold or received; to be recovered by action of debt, with costs, and shall also forfeit to the county in which the offence was committed, twenty dollars, to be recovered by indictment.

It will be seen from the foregoing section that a distinction is taken between the master, owner, or overseer of a slave; and this distinction is not incompatible with the facts which might reasonably exist. A. may be the owner of a slave, with the rights of general property in him; B. may be the master of the same slave, having hired him for a limited period of time, and thereby acquired a special property in the slave; whilst C. may be the overseer of either A. or B., and thereby acquired an immediate right of controlling his conduct.

The indictment charges the dealing to have been had with a slave named Charles, belonging to one Fountain Edwards, without the written permission of the said Edwards. This may be true, and yet the defendant may not be guilty—he may have obtained the written consent of the master or overseer, either of whom may have had the exclusive right of giving such consent. There being three individuals having the right, under the statute, to legalize the traffic between a white man and a slave, the indictment should have negatived the giving of such permission by each and all of them.

The next point raised in the Court below, by the defendant's motion in arrest of judgment, is as to the time alleged in the indictment when the offence was committed.

It may be assumed that in an indictment, charging an offence, it is necessary to allege the offence to have been committed on a fixed, certain and specified day, although the proof need not be so strict as to the day.

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*Jackman vs. Bentley.*


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If the indictment lay the offence on an uncertain or impossible day, as where it lays it on a future day, or on the 31st June, or 30th February, the indictment would unquestionably be bad, being no better than if it were to omit the time entirely. Haw. P. C. 263, 335; Barbour's C. T. 288; Chitty's C. L. 225.

The time laid in the indictment now under consideration, is the 1st January, A. D. *one thousand eighteen hundred and forty-six*. It is then not only bad for want of certainty—for being on a future day, but also for alleging an impossible day, so far as the defendant here is concerned. We are therefore of opinion that the Circuit Court erred in overruling the defendant's motion in arrest of judgment.

The judgment of the Circuit Court is reversed.

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JACKMAN vs. BENTLEY.

1. In a suit before a Justice of the Peace against a Constable for collecting illegal fees on an execution, the execution was described as in favor of A. against B. and C., and of date November 1, 1843. The one offered in evidence was in favor of A., assignee of D. and E., and against B. and C., of date November 6, 1844. The description is sufficient.
2. A constable who, after his term of office has expired, claims and collects as constable, illegal fees, is responsible for the penalties imposed by law, and can not say that he did not collect as an officer.

## APPEAL from Howard Circuit Court.

CLARK, *for Appellant, insists* :

1st. The judgment with the endorsements thereon, read in evidence, were variant from those set out in the plaintiff's account filed with the Justice, and therefore ought not to have been read. The judgment and execution set out in the account was in favor of Samuel C. Major—the one read was in favor of Major as assignee of Boon & Bumgardner, the execution upon which the illegal fees were charged to have been collected, is charged in the account to have been issued on the 1st of November, 1843, the one read was issued the 6th of November, 1844. See Rev. Code for 1844-5, page 639.

2nd. The penalty given for charging and receiving illegal fees, in the 38th section of the act of the Legislature, found in the act concerning fees, at page 506, in the Revised Code of 1844-5, relates to fees collected by individuals as *officers*, and we think does not embrace cases of illegal collections or claims by any person not in office at the time. If any individual, after his office



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*Jackman vs. Bentley.*

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expires, claims or receives illegal fees, he would only be liable as other persons claiming and receiving what did not belong to them.

LEONARD *for Appellee.*

NAPTON, J., *delivered the opinion of the Court.*

This was an action brought originally in a Justices' Court to recover the amount of illegal fees alleged to have been collected from the plaintiff, together with the penalties imposed on such extortion by the 38th section of the act regulating fees. The account filed with the Justice exhibited seven items of costs collected from Bentley, (the plaintiff,) on an execution issued from the office of A. J. Herndon, a Justice of the Peace of Howard County, in favor of Samuel C. Major, and against Patrick Orr and Samuel Bentley, on the 6th November, 1843. The penalty of five dollars on each item was also charged in the account, making the total amount charged against defendant, forty dollars. The plaintiff recovered a judgment for this sum before the Justice, and upon an appeal to the Circuit Court, a new trial took place, which again resulted in a verdict and judgment for the plaintiff.

Upon the trial in the Circuit Court, the plaintiff gave in evidence the judgment before Herndon, and the execution issued thereon, which was in favor of Major's *assignee of Boon & Bumgardner*, against said Bentley and Orr, and was issued in November, 1844.

It appeared that this execution had been issued to the defendant, Jackman, whilst constable of Moniteau township, and been twice renewed, and that after said defendant's term of office had expired, he called upon the Justice to have the execution again issued for his costs, the debt and damages having been previously paid. The execution was accordingly again issued, delivered to the defendant, and by the defendant placed in the hands of S. Stemmons, (his successor in office,) who collected the fees which purported to be due thereon. There was evidence tending to show that defendant had previously collected from Orr, one of the defendants in said execution, these same costs which he thus caused to be collected by Stemmons, his successor.

The Court gave instructions to the jury declaring the defendant to be liable for the costs and penalties, if they were of opinion that these costs had been collected by him whilst constable, and that he caused them subsequently to be collected a second time by his successor. The defendant asked for instructions, which declared the law to be that the

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*Jackman vs. Bentley.*

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defendant was not liable unless he received or collected the costs a second time whilst he was in office, and that the penalty of five dollars on each item did not attach, if the costs were collected the second time by defendant's successor in office.

The appellant has presented two points for our consideration; the first founded upon a supposed variance between the writ of execution offered in evidence, and the one described in the plaintiff's account, and the second relating to the instructions given by the Circuit Court.

The bill of items which the plaintiff is required to furnish before the Justice is authorized to issue his writ, was doubtless designed to apprise the opposite party of the character of the suit, so as to enable him to prepare for his defence. It is not supposed, however, that any great nicety is requisite in its preparation, or that it is to be viewed with the strictness of a common law declaration. The mistakes, in the present instance, which occurred in the date of the execution and in the style of it, were entirely immaterial. The defendant was as well apprised of the charges he was called upon to meet, by having his attention directed to an execution issued in favor of Major vs. Orr and Bentley, as he would have been had the execution been more exactly described. The description, as far as it went, was correct, and the mistake in the date was not likely to mislead any one.

The principal point in this case arises out of the instructions. The appellant contends that as these fees were collected by his successor, and after the expiration of his official term, they cannot be regarded as fees "demanded, charged or received by *an officer*," and their collection therefore does not subject him to the penalty affixed by the statute to extortion. It is true, that when these fees were collected the second time, the defendant was not in office, yet they were collected by him as an officer, had become due to him in that capacity, and in this capacity alone he was entitled to the benefit of that summary mode of collection with which the law had favored him, notwithstanding the expiration of his term of office. Had the amount of these fees been claimed by Jackman as a private citizen, he must have resorted to the customary mode of enforcing his demand by suit, but as he claimed these fees as an officer, and by virtue of this character was authorized by the law to place them in the hands of successor for collection, it does not now lie in his mouth to disclaim his official character with a view to avoid the penalties with which the law has visited his official delinquency.

The other Judges concurring, the judgment is affirmed.

*Cheatham vs. Cheatham.*

CHEATHAM vs. CHEATHAM.

1. Charges of infidelity do not constitute such personal indignities as, under our statute, entitle a party to a divorce. Mere indignities to the moral character or reputation are insufficient.
2. A bill for divorce should shew either that the complainant has resided within the State one whole year next preceding the application, or that the offence complained of was committed within this State, or while one or both of the parties resided within the State.

APPEAL from Saline Circuit Court.

*KELLY for Appellant.*

To reverse the decision in this case the appellant relies on the following authorities: Lewis vs. Lewis, 5 Mo. Rep. 278; Rev. Code p. 426 §1.

*LEONARD, LOWE & CHILTON, for Appellee, insist:*

1st. A charge of infidelity, made by the husband, is not "an indignity to the person" of the wife within the meaning of our statute, upon the subject of divorce. See Rev. Code 1845, p. 426.

2d. Admitting such an imputation to be a good cause of divorce, the fact is not here charged with sufficient particularity of time, place and circumstance. See 2d J. C. R. 224; also 6 John. C. R. 347; 1 Mo. R. 228.

3d. Even if a general charge of the imputation of adultery be sufficient, this bill is defective in not alleging that the accusation was without any reasonable cause on the part of the husband. See 5th Mo. Reps. 278.

4th. It is also defective in omitting to show that the complainant was a resident of this State for one year next preceding the filing of the bill, or that the offence was committed within the State, or while one of the parties resided here. Rev. Statute, Divorce and Alimony, §4.

*NAPTON, J., delivered the opinion of the Court.*

This was an application for a divorce, a *vinculo matrimonii*. The petitioner, Martha S. Cheatham, set forth in her petition that she was married to Joseph B. Cheatham on the 11th day of September, 1846, at the county of Saline; that they co-habited together as husband and wife, until the 22d Nov., 1846, at which time, the petitioner alleges, the said Joseph deserted her, and left her without the means of support; she alleges further, that on the very day of their marriage the said Joseph commenced mistreating her, bidding her not to speak to any man, &c., and that although she had before her marriage and since, conducted her-

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*Cheatdam vs. Cheatham.*

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self in a modest and prudent manner, the said Joseph B. offered the grossest indignities to her person, by charging her with infidelity, and with having a criminal intercourse with other men and with negro men, which conduct, the petitioner alleges, rendered her condition intolerable; it is also charged that during the time of their co-habitation, the said Joseph procured a loaded pistol, and conducted himself in a menacing, cruel, and barbarous manner towards the said petitioner, so as to make her believe her life was in imminent danger, &c.

To this petition the defendant demurred, and the Circuit Court sustained the demurrer, and the only question for our determination is the sufficiency of this petition.

The only allegation in the petition which is relied upon as sufficient to authorize a divorce, is the charge of such personal indignities as rendered the petitioner's condition intolerable. The personal indignities specified, were charges of infidelity made by the husband.

In the case of *Lewis vs. Lewis*, decided by this Court in 1838, (5 Mo. Rep. 278,) the bill contained a general charge of indignities offered to the person of the complainant, without specifying in what those indignities consisted. The defendant's answer denied the allegations of the bill, and the proof was that the husband had charged the wife with infidelity. The Court was of the opinion that though the bill might have been demurred to successfully, the charges of infidelity were indignities to the person within the contemplation of the statute.

The grounds upon which this construction of the statute was made, are not disclosed in the published opinion. There can be no doubt that too great a facility in obtaining divorces is exceedingly injurious to the good morals and happiness of domestic life. Whilst therefore it devolves upon the Courts to decree divorces in such cases, and upon such grounds as the legislature have determined to be sufficient, they are certainly not required or expected to let in a multitude of cases, by construction, which neither the letter of the statute, nor the soundest principles of public policy, would tolerate. If charges of infidelity, brought by the husband against his wife, are construed to be such personal indignities as authorize the Courts to decree a divorce, it is not easy to conjecture to what lengths this principle of construction may lead. How countless the charges and cruel insinuations which may be imagined to spring up from the sudden passion or jealous temperament of the husband, which may be as galling to the sensitive delicacy of a refined woman as the charge of infidelity itself. If mere words will constitute the indignities to the person mentioned by the statute, by what standard of refinement shall the offended

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*Cheatham vs. Cheatham.*

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sensibilities of the female be estimated? Natural temperament, education and the associations of life will very much vary the degrees of unhappiness and discomfort which reproaches of this character would be likely to produce.

It may be difficult to point out with precision what are the personal indignities alluded to by the statute. Giving the language of the act a literal construction, and looking at the contiguous clauses to the one now in question, we may safely assume that they, at least, have reference to *bodily* indignities as contradistinguished from such as may be offered to the mere reputation. The statute declares that such cruel and barbarous treatment as endangers the life of the other, and such indignities to the person as shall render his or her condition intolerable, are causes of divorce. The first specification is merely the *sæ vitia* of the civil law, and the second seems but another species of the same class, but not of the same enormity with the first. The cruelties must be such as to endanger the life of the other—the indignities need only be such as are calculated to render the condition of the injured party intolerable, but they must be indignities *to the person*. The *sæ vitia* of the civil law was never understood to embrace mere opprobrious language. If words, unaccompanied with actual violence, constituted the charge, they must have been such as to inflict indignity and threaten pain, and produce a reasonable apprehension of injury to the person or health of the party complaining. *Kirkman vs. Kirkman*, 1 Hagg. 409. Indeed, even threats of violence to the person have, in Massachusetts, been held insufficient to support the charge of cruelty, (*Hill vs. Hill*, 2 Mass. R. 150,) and although such decisions may be inapplicable to our statute, they tend to show the extreme caution with which the Courts have ventured to interfere with even the temporary dissolution of the marriage contract.

In *Lewis vs. Lewis*, the Judge who delivered the opinion of the Court, observed that the charge made by the husband, (of infidelity,) was as well calculated to render the life of a young and virtuous wife intolerable, as any other that could be made. This may be true, but the statute did not declare that charges against the *moral* character of the wife, however intolerable they might be, should constitute grounds for a divorce. The statute designs to protect the *person* of the wife, but further than this the statute does not interfere. It leaves the moral differences, springing up between man and wife, to regulate themselves, acting upon the principle of the civil law, so admirably expressed by Sir W. Scott, in the case of *Evans vs. Evans*, (1 Hagg. 36,) "that when people understand that they *must* live together, except for a very few reasons known to the law, they



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*Smith vs. Winston.*


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learn to soften by mutual accommodation that yoke which they know they cannot shake off."

We have thought it unnecessary to notice several of the minor objections to this petition, growing out of this charge of personal indignities, but there is one objection which has been made, disconnected with the insufficiency of the charge, which we think sufficient of itself to sustain the demurrer. It is not stated in the petition that the complainant has resided within the State one whole year next before the filing of the bill, nor does it allege that the offence complained of was committed within this State, or whilst one or both of the parties resided within this State. One or other of these statements is made essential by the 4th section of the statute, to give jurisdiction to the Court.

Judge McBRIDE concurring, the judgment of the Circuit Court is affirmed.

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 SMITH vs. WINSTON.
 

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1. In an action of replevin, a plea of justification alleging that the defendant, as constable, seized the property by virtue of an execution, where the party in possession of the property was not the defendant in the execution, must aver that the property was the property of the defendant in the execution.
2. If a plaintiff in an action of replevin take a non suit, the defendant is entitled to the same judgment and damages as if he had recovered a verdict against the plaintiff.

## ERROR to Buchanan Circuit Court.

## JONES &amp; EDWARDS, for Plaintiff, insist:

1st. That Winston having failed to prosecute his suit with effect and without delay, the Court or jury ought to have assessed the value of the property taken, and damages for the use of the same. Rev. Stat. Mo. 922, §8.

2nd. That the judgment in this case ought to have been against Winston and his securities, that he return the property taken or pay the value assessed at the election of Smith, &c. Rev. Statute Mo. 922, §9.

3rd. That a judgment, though pronounced by the Judge, is the sentence of the law, and if the Judge pronounce a wrong judgment, i. e. one not warranted by the law arising upon a certain state of facts judicially made known to the Court, either by the admission of parties in their pleading, or found by a jury, it is error. See Blackstone's Com. vol. 3, p. 396.

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*Smith vs. Winston.*

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4th. That there is no such thing in law as a non suit in an action of replevin, and that if Smith even had consented to the non suit, it could not effect his rights in this case, and that the statement in the record of the non suit must be rejected as surplusage.

5th. That the Court below erred in overruling the several motions of Smith, and in refusing to assess the value of the property, &c.

**WILSON & REES, for Defendant, insist :**

1st. That inasmuch as the non suit was taken without objection, and when the Court afterwards was about to set it aside, voluntarily both parties insisted that it should stand, it is to be taken as done by consent of parties.

2nd. The Circuit Court, if it had set aside the non suit, could not have given judgment for the defendant below on the demurrer as asked in said motion of said plaintiff in error. See *Thompson vs. Button*, 14 J. R. 83. *Durham vs. Wyckoff*, 3 Wend. R. 280. Where trespass *de bonis asportatis* lies, so will replevin. 7 J. R. 142. See *Gibson vs. Mozier*, 9 Mo. Reps. 256.

3rd. There is no motion made in the Court below in arrest of judgment, without which, errors in the record here cannot be taken advantage of.

**NAPTON, J., delivered the opinion of the Court.**

Winston filed a declaration in replevin against Smith, the plaintiff in error, to recover possession of a negro woman named Susan, and having made the affidavit required by our statute, and given the requisite bond, was put in possession of the slave. The defendant pleaded not guilty, and specially, that he was a constable of Washington township, in Buchanan County, and by virtue of an execution against one Ewell, duly issued, and to him directed, he levied the same upon the said slave, and detained her by virtue of said execution, &c. To this special plea the plaintiff demurred, but the demurrer being overruled, the plaintiff took a non suit, with leave to move to set it aside. The Court thereupon entered a judgment, that the defendant go hence without day, and that the plaintiff recover his costs, &c.

Afterwards the defendant moved to set aside the non suit, and enter up judgment on the demurrer, and have the value of the property assessed. The defendant also filed two other motions very much the same in substance, that the Court assess the value of the property and the damages for the use of the same, or that the same be assessed by a jury. These motions were all overruled. The defendant took his bill of exceptions and brought the case here by writ of error.

I. The first question presented by the record is the propriety of the special plea, which the Circuit Court held good on demurrer. We think the plea a bad one. The second section of the act regulating the action

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*Smith vs. Winston.*

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of replevin, (Rev. Code, 1845, page —,) applies only to cases where the plaintiff in replevin is the defendant in the execution. *Gardner vs. Campbell*, 15 J. R. 401. If an officer having an execution against A., undertakes to execute it upon goods belonging to B., he assumes the responsibility of showing that such goods are the property of A. Here the plea is that by virtue of an execution against a stranger, the defendant being the officer to whom the writ of execution was directed, levied it upon the slave in question. The plea seems to admit that the property levied on was found in the possession of the plaintiff in replevin, and it does not aver that the property belonged to the defendant in the execution. The plea is therefore bad, according to *Thompson vs. Button*, 14 Johns. Reps. 87.

II. It has been determined in England, in an action on a replevin bond, with condition to prosecute with effect, that a non suit or discontinuance is a breach of the condition. *Bac. Abr. Replevin, D. Ewellin vs. Holbrook*, 1 B. & C. 410. Our statute (§8) provides, that if the plaintiff fail to prosecute his suit with effect and without delay, the Court or jury shall assess the value of the property taken, and the damages for the use of the same, from the time of issuing the writ until return made. It is further provided, that the judgment in such cases shall be against the plaintiff and his sureties, that he return the property taken or pay the value so assessed at the election of the defendant, and pay double damages for the detention of the property, and also the costs of suit. By the common law, the judgment in case of a non suit was different from a judgment upon the merits, or upon demurrer or confession, and to remedy this inconvenience, the statute of 13 Edw. 1 C. 2, was enacted, which, however, was construed to apply only to cases where the cause was removed into the Superior Court, and the plaintiff was non suited there. 2 *Whea. Selwy.* 925. The statute of 17 Car. 2 C. 7, more fully provided the modes of proceeding in all cases of distress for rent in arrear. It would seem that by the common law, in case of a non suit, except in cases where it was reached by the two statutes just referred to, the judgment would be merely for a return of the property, and not as in other cases for a return of the distress irreplevisable. Under the provisions of our statute, however, it is plain that the judgment would be alike in all cases where the plaintiff fails to prosecute his suit with effect, and as a non suit is clearly one of those cases, the defendant is entitled to the judgment specifically pointed out by the act.

In this case, as the non suit was obviously occasioned by the judgment

*Fry vs. Baxter.*

of the Court upon the defendant's special plea, the judgment of the Circuit Court will be reversed, and the cause remanded.

FRY vs. BAXTER.

1. An omission in action of trover for the conversion of a note, to allege the value of a note, can only be reached by a special demurrer.
2. Neither payment, set off, nor fraudulent representations as to the consideration of the note, can be pleaded as defence in bar to an action of trover for the conversion of a note.

ERROR to Marion Circuit Court.

*WELLS, for the Plaintiff, insists:*

Trover is an action *ex delicto*—the wrong consists in the *conversion* of the plaintiff's goods, and no plea is good that does not controvert this allegation.

No plea is good in an action of *tort* which is good in an action *ex contractu*.

The plea of payment of the note does not answer the charge of the conversion of the note.

The plea of fraud, in the consideration of the note, does not answer the charge of the conversion of the note.

The pleas only go in mitigation of the damages. They deny neither the plaintiff's title to the note, nor the defendant's conversion of it.

If the pleas are intended to show that plaintiff had no right to the note, they amount only to the general issue, and are therefore bad. 1 Chitty 168, 559, 560.

*ANDERSON & DRYDEN, for Defendant, insist:*

1st. That each of said pleas presents a good and sufficient defence to the plaintiff's action.

2d. If this Court should think the pleas bad, still the decision of the Circuit Court is right and must be sustained, because the declaration is substantially defective in not alleging that the note charged to have been converted, was of *any value*. See 1st Chitty's Pl. p. 707. That the averment here wanting is essential to the validity of the declaration. See Cro. Jac. 130; 8th Wentworth's Pl. 372; 2 Ch. Pl. p. 836; 3 Camp. 477; 6th Com. Law Rep. 421.

*NAPTON, J., delivered the opinion of the Court.*

Fry brought an action of trover against Baxter, for a promissory note, given by defendant to plaintiff, for one hundred dollars; the defendant pleaded not guilty, and three special pleas. The defence set up in the

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*Grissom vs. Allen, adm'r.*

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first plea, was that defendant had paid the note with interest, &c., and having so paid it, came to the possession of the note *by finding*, and retained the same as he might lawfully do. The second plea was a plea of set off, and the third special plea was that the note was given as the consideration of a certain machine for cutting shingles, sold by the plaintiff to the defendant, and falsely and fraudulently represented to be a useful invention, &c., whereas the machine was wholly valueless, &c. The general issue was subsequently withdrawn, and the plaintiff demurred to the special pleas, the demurrer was sustained to the second special plea, and overruled as to first and third. Judgment was rendered on the demurrer for the defendant, and the case is brought here by writ of error.

The defendant in trover is at liberty to plead specially anything which admits the property in the plaintiff, and the conversion, but justifies the latter. 1 Ch. Pl. 436. The special pleas of the defendant in error, either do not admit the conversion, and are therefore bad, (*Hurst vs. Cook*, 19 Wend. 469,) or, admitting the conversion, they do not justify it, but state facts which would only operate to reduce the damages. The measure of damages in trover, for a note, is its nominal value, unless that be reduced by showing payment or the insolvency of the maker, or some facts to invalidate the note. *Ingolls vs. Lord*, 1 Cowen Rep. 240. The payment and the fraud pleaded, would therefore only destroy the plaintiff's right to anything more than nominal damages.

The omission in the declaration to state the value of the note is a defect which can only be reached by special demurrer. *Mayor, &c., vs. Clark*, 4 Barn. & Ald. 268; *Bradford vs. Ramsey*, Cro. Jac. 654.

Judge McBRIDE concurring, the judgment is reversed.

SCOTT, J., absent.

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GRISSOM vs. ALLEN, ADM'R.

A judgment having been recovered in a Justices' Court, and a large portion paid, an execution issued from the Circuit Court on a transcript of the judgment being filed in the Clerk's office, will not be quashed for informalities in the proceedings before the Justice, it appearing from them that the defendant had appeared and submitted to the judgment.



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*Grissom vs. Allen, adm'r.*

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## APPEAL from Perry Circuit Court.

McBRIDE, J., *delivered the opinion of the Court.*

Allen commenced his action before a Justice of the Peace against Grissom and one Hezekiah Cotner, on two promissory notes, one executed by Grissom alone, and the other by Grissom and Cotner. The constable returned the summons "executed according to law." The transcript of the Justice then proceeds to state that "the defendant appeared and acknowledged both notes to be just, and that he was willing for judgment to be given against him the first day. It is therefore considered by the Justice here, that the plaintiff have, and recover of, and from the defendants, Washington Grissom and Hezekiah Cotner, the sum of \$7 38 for his debt, &c., and also that he have, and recover of, and from the said Washington Grissom, on the other note, the sum of \$28 16 for his debt, &c."

On the foregoing judgment, execution issued, directed to the constable of the township, dated the 22nd May, 1845, which was renewed by an endorsement made thereon by the Justice on the 26th July, 1845, for sixty days. On the 25th October, 1845, the execution was again renewed by the endorsement of the Justice for sixty days. The execution was returned by the constable with the endorsement of two credits, amounting to \$29 19, and no property, goods or chattels found out of which to make the balance of the debt and costs.

On the 19th March, 1846, a transcript was filed in the office of the Clerk of the Circuit Court of Perry County, and an execution was issued from that office on said transcript, on the 19th April, 1846, directed to the Sheriff of Perry County, who executed the same by levying it on the real estate of said Grissom.

At the May Term, 1846, of the Perry Circuit Court, the defendant, Grissom, moved the Court to quash the execution, which motion was overruled; thereupon he filed a petition and motion for a prohibition, which the Circuit Court overruled, and to both decisions of the Court he excepted and appealed to this Court.

Several points are made in this Court by the appellant to reverse the judgment of the Circuit Court, which it is not necessary to notice in detail. It is obvious from the record that the appearance of the defendant, as stated by the Justice, was that of Grissom, who was liable to an action on both the notes upon which suit was brought; otherwise it is

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*Rittenhouse vs. Myers.*


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not probable that the Justice would have entered judgment against him on the large note, at the suggestion of Cotner, who was not a party thereto. This fact is further manifest when it is seen that the greater part of both notes is discharged after judgment, and that the motion filed and appeal taken are at the instance and in the name of Grissom, the principal debtor. Now, however informal the proceedings may have been, as to Cotner the security, no notice should be taken of them until he complains; and as to Grissom, the judgment and subsequent proceedings in which he appears, for the time being, to have acquiesced, we do not discover any substantial error requiring correction by this Court.

The informality of the judgment and execution—the failure of the constable to endorse on the execution the date of its delivery—the omission of the Justice to enter on the docket the fact of the executions having been renewed by him,—the technical omission of the constable in his return on the execution, and many other irregularities and omissions of the same character, where it is clearly seen that no injury has resulted to the party, are not in our opinion sufficient to authorize the reversal of the judgment of the Circuit Court. The appellant not showing himself aggrieved by the judgment of the Circuit Court, the judgment of that Court is affirmed.

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RITTENHOUSE vs. MYERS.

An assignment of a receipt given for the collection of certain notes, does not transfer to the assignee the legal title to the receipt, nor to the notes.

**ERROR to Chariton Circuit Court.**

*DAVIS, for Plaintiff, insists:*

1st. That the receipt of Myers was improperly rejected as evidence to the jury in support of the declaration.

2nd. Also, that the Circuit Court in assuming that the assignment on the back of the receipt was executed by Levi Rittenhouse, and the same delivered to Samuel Rittenhouse in pursuance of said assignment, took from the jury the province of deciding controverted facts—even if that question could have been a controverted point in the cause;—but,

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*Rittenhouse vs. Myers.*

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3rd. If the receipt were assigned to Samuel Rittenhouse, he must prosecute a suit upon it in the name of Levi Rittenhouse, it not being assignable at law so as to vest the legal title in him.

*CLARK, for Defendant, insists:*

1st. The assignment endorsed on this receipt containing as it does a list of the notes by name and amount, is an assignment and transfer of the legal title to them within the meaning of our statute, and the decisions of this Court. See 7 Mo. Rep. 120—270. If we are right in this position, the receipt thus transferred showed the plaintiff had no right of action against the defendant, therefore it ought not to have been read.

2nd. Whether the receipt offered in evidence is assignable or not, under our statute, so as to pass the legal title to the assignee, it certainly passes an equitable title and gives the assignee the property in the notes described in it. This, then, being an action of assumpsit brought upon the receipt, the endorsement showing the plaintiff had parted with his interest, is a clear admission that he had no claim on that undertaking against the defendant, the evidence contained in the receipt with the endorsement upon it was therefore irrelevant and ought not to have been received. The fact that it did not appear that the receipt after it was assigned was delivered to the assignee, cannot assist the plaintiff, it was his duty to rebut the presumption raised by the assignment. 1 Greenleaf's Ev. 173, and notes.

*McBRIDE, J., delivered the opinion of the Court.*

Rittenhouse brought his action of assumpsit in the Chariton Circuit Court against Myers. The declaration contained a special count for money had and received. The defendant pleaded *non assumpsit*, and gave notice of a set off under the statute.

At the trial in the Court below, the plaintiff introduced a witness who testified that about the 1st of February, 1846, he went with the plaintiff to the house of the defendant, when the plaintiff demanded of the defendant certain bonds and notes, or the money collected on them, the same being described in a receipt given by defendant to plaintiff embracing several notes received for collection and dated 20th October, 1843. On the back of this receipt was the following endorsement, bearing even date with its execution, to-wit: "For value received I assign the within receipt to Samuel Rittenhouse, October 20th, 1843. Levi Rittenhouse."

The witness also testified that the defendant admitted the credits on the face of said receipt were correct—defendant also stated that one of the notes in said receipt mentioned, was in the hands of a lawyer in Huntsville for collection, and that he would bring the balance of the notes to Glasgow, where plaintiff resided, and deliver them to plaintiff, and settle with him on the next Sunday; but defendant did not come—the defendant also stated that he had some tax receipts against the plaintiff, but they could settle as they had settled the land matter.

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*Rittenhouse vs. Myers.*

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The execution of the receipt by the defendant was admitted by him, and the execution of the assignment admitted to be in the hand writing of the plaintiff; whereupon the plaintiff offered to read to the jury the said receipt, which was objected to by the defendant, and his objection sustained by the Court, to the opinion of the Court in excluding the receipt from the jury the plaintiff excepted, and took a non suit with leave, &c., subsequently the Court overruled the motion of plaintiff to set aside the non suit, and he has brought the case here by writ of error.

The question is, did the Circuit Court commit an error in excluding the receipt, offered in evidence, from the consideration of the jury?

The receipt executed by the defendant, containing as it does a list of the notes by the name of the payees, and amount due and owing by each, being assigned, it is contended amounts to an assignment of the notes, and transfers the legal title to said notes to Samuel Rittenhouse within the meaning of our statute, and if the legal title be vested in him by the said assignment, it showed that the plaintiff had no cause of action.

Our statute, concerning the assignment of bonds and notes, R. C. 1845, p. 190, §2, embraces only bonds and notes for the direct payment of money or property. The receipt in question is neither the one nor other, and consequently is not assignable so as to enable the assignee to maintain an action in his own name. But, is the endorsement on the receipt an assignment of the notes therein specified? We apprehend not. The assignment does not undertake to transfer the notes, but declares the object to be to transfer the receipt itself. If the notes were assigned so as to vest the legal title in the assignee, by the assignment of the receipt as the law formerly was, then actions brought on them would have to be brought in the name of the assignee. Suppose Samuel Rittenhouse held the receipt in question, and suits were commenced in his name as assignee of Levi Rittenhouse by the defendant, against the obligors in said notes, and they should demand of Samuel the evidence of his legal title—surely he could not establish that title by producing the assignment on the receipt.

As to any equities between Levi and Samuel Rittenhouse growing out of the simple act of writing an assignment on the receipt, we apprehend the defendant here has nothing to do.

The receipt should have been permitted to be given in evidence;—wherefore the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings to be had in the Circuit Court.

*Morrow vs. Smith.*

MORROW vs. SMITH.

Parties entered into an agreement, under seal, to submit certain matters in dispute to three of their neighbors. The arbitrators so chosen by the agreement of the parties, were not sworn, but the parties took an oath to abide by their decision. They found for the plaintiff \$60 00, and defendant thereupon promised to pay it. In an action of assumpsit to recover the amount, the agreement under seal is competent to shew that there was a good consideration for the promise.

APPEAL from Holt Circuit Court.

WILSON & REES, *for Appellant, insist:*

That the Court erred in permitting the evidence of the appellee to be given, and also in giving judgment without proof of the submission. In an action on an award, it is necessary to prove the authority delegated by the parties to the arbitrators; if the authority be by deed, it must be produced, and the execution by all the parties to the reference proved. 2 Starkie Ev. 137; Doe vs. Bossier, 3 East. Rep. 15; Herbert vs. Cook, Willis Rep. 86.

EDWARDS & JONES, *for Appellee, insist:*

1st. That the award of the arbitrators is binding upon both parties, unless the arbitrators have exceeded their authority, or been guilty of some fraud or improper conduct to the prejudice of the appellant.

2d. That substantial justice has been done in this case, the verdict and judgment having been rendered for the right party.

3d. That where this Court can see that the verdict and judgment have been given for the right party, upon the whole case, it will not reverse the judgment of the Court below, unless *substantial justice* requires it, even although the proceedings of the Court below may not have been in exact accordance with the technical rules of law. 9 Mo. Rep. 305, Maston vs. Fanning.

4th. That this case having originated before a justice of the peace, where cases are decided according to *law and equity*, the greatest liberality ought to be extended in favor of the proceedings of the Court below.

5th. That there is no error in the proceedings in the Court below, and that its judgment ought to be affirmed.

McBRIDE, J., *delivered the opinion of the Court.*

This action originated before a justice of the peace, where the plaintiff obtained judgment, from which the defendant appealed to the Circuit Court, where judgment being again rendered against him, he has appealed to this Court.



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*Trimble and wife vs. Hensley, adm'r.*

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The record shows that the plaintiff sold to the defendant his claim to the land upon which he resided, for which the defendant was to pay \$200, a part of which was then paid, and the balance to be paid at a future day. The agreement was reduced to writing, between the parties, and contained innumerable reservations of house room, pasture land, plough land, &c., in favor of the plaintiff. Endorsed on the article of agreement is a credit of \$140, in two payments. Some months after the date of the foregoing transaction, the parties enter into an agreement (or bond) under seal, to submit the matters in dispute between them, concerning the sale and purchase of the land, to the arbitrament of three of their neighbors, named therein. There being present at the time of the meeting of said arbitrators but one justice of the peace, and he being one of the board, the parties dispensed with their being sworn, but took an oath themselves to abide by and stand to the award then about to be made.

The arbitrators awarded that the defendant should pay the plaintiff the sum of \$60; on announcing their decision the parties expressed themselves satisfied, and the defendant promised the plaintiff to pay him the sum of \$60. The defendant subsequently having failed and refused to pay the \$60, the plaintiff brought his action to recover the same.

On the trial in the Circuit Court, objections were raised to the reading of the first agreement, and also to the award of the arbitrators; it was also insisted that no action could be sustained on the award, as it was not under seal, &c. These objections, we think, were properly overruled by the Circuit Court, for the evidence was necessary to explain the transaction and show that the promise made by the defendant, after the announcement of the decision of the referees, to pay the plaintiff \$60, was founded upon a good and sufficient consideration.

We have thought proper to state the case and affirm the judgment on the merits, as we are able to collect them, although properly speaking there is no bill of exceptions in the record. The whole record is signed by the Judge.

Judgment affirmed.

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TRIMBLE AND WIFE vs. HENSLEY, ADM'R.

A devise of a slave to "one and her heirs," vests an absolute estate in the devisee.

*Trimble and wife vs. Hensley, adm'r.*

### ERROR to Callaway Circuit Court.

#### J. F. JONES, for Plaintiffs, insists:

1st. That in the construction of a will, the intention of the testator shall be strictly adhered to, that all other considerations shall yield to this when practicable, and that every substantial and material word therein used shall be construed to have some meaning. See Minot's Digest, page 737-1. 4th Mass. 214 and 6. 1st Met. 446.

2nd. That where the terms "heirs," "heirs and assigns," and "heirs and assigns forever," are used in a will, as a general rule they mean, and must be construed to mean, the children of the devisee. 4th Pick. 207 and 8.

3rd. That where property is devised to a person, and his or her heirs or children, who at the time of the devise had no child or children in existence—the devisee takes a life estate only, and hence the heirs take by purchase. See 15 Pickering, page 114.

4th. That in case of devise to females where the terms "heirs and assigns forever," are used, the reason for making her estate a life estate only, is much stronger than in the case of males, for in the case of a female devisee, if she have children by two husbands, and the construction of the Court below be correct, her heirs never can take, those only by the first husband will share all the benefit of the bequest to their mother, and those by the second husband, though they be two to one in number, and equally near to the mother, who was the object of the devise, will get nothing. The construction given by the Court below makes a part of the will to mean nothing, and works infinite hardship, injustice and oppression.

#### SHELEY, for Defendant, insists:

1st. The gift is too remote for the first taker to take a life estate in the slaves; the contingency is too remote to be allowed by the policy of the law. Williamson and others vs. Daniel and others, 12 Wheaton Reps. 568; Hatton vs. Wrems, 12 Gill & Johnson, 107; Danger vs. Chancy, 4 Harris & McHenry, 397; Bell vs. Gillespie, 5 Randolph's R. 273; Georgia R. 1842—3, 2nd part page 25, Mayer vs. Wiltberger.

2nd. The bequest being to Nancy Bailey and her heirs forever, is too remote, and if the word heirs in the will is construed to mean children, then it is an estate tail—general, which she takes in the slaves, and by the rule of the common law, she is vested with the absolute property in the slaves, as no remainder ever could be limited after an estate tail in personal property. See 2 Blackstone's Com. 113, note 17, where it is laid down that after such a gift or grant, either by deed or will, the first taker becomes vested with the absolute property, and that all subsequent limitations are null and void. See 2 Kent's Com. 286, Williamson and others vs. Daniel and others, 12 Wheaton, 568; Griffith vs. Thompson, 1 Leigh's Va. Reps. 330; Adams vs. Cruft, 14 Pickering Reps. 252; Goodrich vs. Harding and others, 3 Randolph's Reps. 280; Nottingham vs. Jennings, 1 Salkeld's Reps. 233; Barlow vs. Salter, 17 Vesey's C. R. 479.

3rd. If it be insisted that the intention of the testator should always govern in the construction of wills, in this case the face of the will itself shows that the testator knew apt words to limit an estate, for there is a previous devise to one during life, and after death to her children.

#### McBRIDE, J., delivered the opinion of the Court.

Trimble and wife brought their action in *detinue* against Clark's ad-

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*Trimble and wife vs. Hensley, adm'r.*

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ministrator, to recover certain slaves. The evidence shows that Mrs. Trimble was Nancy Bailey, and whilst sole and unmarried, the mother of the slaves in controversy was devised to "*her and her heirs forever*," by her grand-aunt, Sarah Ann Garner, of Woodford County, Kentucky. At the date of the bequest, Nancy Bailey was of tender years, and the negro girl slave only about two years old. That subsequently, the girl come to the possession of Miss Bailey, and whilst in her possession, she intermarried with Thomas Clark, who acquired possession of the negro girl, and continued to enjoy that possession up to the time of his death, and the defendant, Hensley, holds as his administrator. That Clark left children by his said wife; that Mrs. Clark intermarried with Trimble, the plaintiff, who now claims the negro woman and her increase under the bequest aforesaid.

The plaintiff then moved the Court for the following instruction:—"If the jury believe from the evidence that Nancy Trimble, one of the plaintiffs in this action, is the identical person to whom the bequest in said will was made, and that the negro slaves sued for are the same that were willed to her, then they shall find for plaintiffs. That said will gives to said Nancy Trimble a life-time estate in said negroes, free from the control of the administrator of her late husband, Thomas Clark, deceased," which the Court refused, and thereupon the plaintiffs took a non suit, with leave to move to set the same aside, but the Court refusing to set aside the same, they have brought the case here by writ of error.

The question raised in the Court below by the instruction asked by the plaintiffs, and now submitted for the decision of this Court, is, what title was vested in Mrs. Trimble, by the will of her aunt, to the property in controversy. The use of the words "*her and her heirs forever*," is supposed to operate as a limitation upon her title. Such was certainly not the rule of the common law, for at one period of its history it was held that those words were absolutely necessary to create an estate in fee simple. But this particularity in language was never applied to the construction of wills, it being always considered sufficient to vest an absolute estate where it could be fairly deduced from the language of the testator that he so intended. 2 Blk. Com. 110, and following.

It is thought, however, that some aid can be derived from our statute concerning wills. R. C. 1845, p. 1085, §47. This section provides that where the words "heirs and assigns," or "heirs and assigns forever" are omitted, and there is nothing in the will showing an intention on the part of the testator to limit the estate devised, it shall be considered as vesting an absolute estate in the devisee. If any legitimate argument is to

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be derived from the provisions of this section, it would appear to be against the ground assumed for the plaintiffs, for the statute presupposes the words quoted to have been necessary to create an estate in fee simple, and declares that they shall not hereafter be necessary. If the words were not in the will, and were important to give effect to the devise, then our statute might be appealed to, and would come in aid of the omission in the will.

The title, then, which Miss Bailey acquired to the negro girl under her grand-aunt's will, was an absolute, unconditional estate in fee simple, and on her marriage with Thomas Clark, he by virtue of his marital rights succeeded to all the estate she had in the negro in possession. When Thomas Clark died, his widow was entitled only to a dower interest in those negroes, inasmuch as they constituted as much a part of his absolute estate as any other negroes he may have been possessed of at his death. See *Griffith vs. Walker*, 3 Mo. Reps, 191, 2nd ed.

The judgment of the Circuit Court is affirmed.

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PICOTTE, ET AL. VS. COOLEY, ET AL.

Under the Spanish law property, real and personal, acquired or purchased during marriage, enters into the community, and at the death of the husband, one half goes to the wife. *Lindell vs. McNair*, 4 Mo. R. 380, affirmed.

#### ERROR to Pike Circuit Court.

*BIRD for Plaintiffs.*

*GAMBLE & BATES for Defendants.*

*SCOTT, J., delivered the opinion of the Court.*

This was an action of ejectment, commenced against the defendants in error by the plaintiffs in error, for a tract of land situate in the county of Pike. On the trial of the cause, the jury found the following special verdict: "As to the trespass and ejectment in said declaration mentioned on and in the parcel of the tract of land, in said declaration mentioned, and situate in the county of Pike, bounded as follows, to-wit: commencing at the north-western corner of United States' survey number one thou-

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sand, seven hundred and thirty-seven, in the south-east quarter of section thirty-five, township fifty-two north, range one east; thence north sixty degrees east, with the north-western boundary line of said survey two hundred and forty-five chains, to the most northern corner thereof, in the north-west quarter of section twenty-nine, township fifty-two north, range two east; thence south thirty degrees east, with the north-eastern boundary line of the said survey number one thousand seven hundred and thirty-seven, one hundred and eighty chains to the intersection with the line between township fifty-one and fifty-two north, range two east; thence west with the said township line, and the line between township fifty-one and fifty-two north, range one east, to the intersection with the south-western line of survey one thousand seven hundred and thirty-seven; thence north thirty degrees west, with the said south-western boundary line, thirty-six chains and seventy-four links to the most western corner and place of beginning, containing one thousand and six hundred and fifty-five acres and six hundredths of an acre, being parcel of a tract of land granted by Zenon Trudeau, lieutenant governor of Upper Louisiana, under the Spanish government, to Joseph Brazeau, and subsequently confirmed under the authority of the United States to said Brazeau, and bounded northwardly by land now or lately claimed by the heirs of Auguste Chouteau; southwardly by lands now or lately claimed by Peter Chouteau, and by land now or lately claimed by Auguste A. Chouteau, and eastwardly by land of the United States, or of persons claiming under the same, and is the same tract described in the deed executed by Antoine Soulard and Julia, his wife, Maria Therese Brazeau, widow of Joseph Brazeau, and Baptiste Duchouquette, to Mary E. Carter, Walter Coles, and Edward Coles, dated twenty-fifth day of of November, in the year 1818; that the same is situate in the counties of Pike and Lincoln, and State of Missouri, and was conceded to the said Jos. Brazeau, by the proper authorities of the Spanish government, on the 18th day of December, in the year 1797; that the said Joseph Brazeau became thereby seized and possessed thereof, and being so seized and possessed, he, on the 5th day of May, in the year 1798, made his last will, purporting to devise the said tract of land, in full enjoyment and during her natural life only, to Maria Therese Delisle, his dear spouse, and from and after her death, to his niece Marie Brazeau, absolutely and forever; that on the 22d day of November, in the year 1816, at St. Louis, in the territory of Missouri, the said Joseph Brazeau, being so seized and possessed of said tract of land, departed this life; that on the 26th of November, in the year 1816, at St. Louis, in the territory of Missouri, the last will



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aforesaid, of the said Joseph Brazeau, was duly proved; that the said concession was confirmed by the United States, on the 12th day of April, the year 1814, to the said Joseph Brazeau; that the said Joseph Brazeau, and Marie Therese Delisle aforesaid, his wife, were married at Kaskaskia, in Illinois, on the 7th day of November, in the year 1769; that the said Marie Brazeau, niece and devisee aforesaid of the said Joseph Brazeau, intermarried on the 3rd day of July, in the year 1798, at St. Louis, in the province of Upper Louisiana, with Jean B. Duchouquette; that the said Marie Brazeau, wife of the said Jean B. Duchouquette departed this life at Louis, in the territory of Missouri, on the 8th day of July, in the year 1818; and the said Jean B. Duchouquette departed this life on the 23d day of March, in the year 1833, at St. Louis, in the State of Missouri. And Marie Therese Delisle, widow of Joseph Brazeau, departed this life at St. Louis aforesaid, on the third day of February, in the year 1834; that a marriage contract was executed between the said Marie Brazeau and Jean B. Duchouquette, previous to their intermarriage, to-wit: on the 2d day of July, in the year 1798, at St. Louis aforesaid, by which it was provided that the said Jean B. Duchouquette, and Marie Brazeau, have promised to take one another in the name and law of marriage, and to have the same made and solemnized in the Catholic, Apostolic and Roman church, our holy mother, as soon hereafter as may be, or as soon as one or other of the parties shall require it of the other; the said future husband and wife to be united and common in all estate, (*biens*,) moveable and immoveable purchases, (*conquets*,) and acquisitions, (*acquets*,) according to their desire, without power to change any thing from this disposition, even if they should make purchases, or transfer their residence in a country where the laws, usages and customs are contrary, which they expressly derogate and renounce; the said future husband and wife take each other with all their rights and estate, (*biens*,) such as have come and follow to them, or may fall to them from the succession of their father and mother, to whatever sum they may amount, of whatever nature they may be, and in whatever place situate, even from this present time, with those they may have of their own, either by donation or otherwise; it shall and may be lawful to the said future wife, and to the children which may issue from the said marriage, in renouncing the present community, to retake freely, clearly, and frankly all and whatever she may have brought, or may have happened and befallen to her during the said marriage, either by inheritance, gift, bequest, or otherwise. And the jurors aforesaid, upon their oaths aforesaid, do further find that Therese Picotte, one of the plaintiffs, is a daughter of the said Jean B. Duchouquette and

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Marie Brazeau, his wife; that said Therese was born at St. Louis aforesaid, on the 9th day of February, in the year 1813, and intermarried at the same place on the 15th day of August, in the year 1831, with Honore Picotte, one of the plaintiffs; that John B. Lesperance, another of the plaintiffs, is the surviving husband of Elizabeth Lesperance, deceased, which said Elizabeth was a daughter of the said Jean B. Duchouquette and Marie Brazeau, his wife, and was born at same place on 9th day of September, in the year 1815, and intermarried at same place on the 7th day of July, in the year 1834, with said Jno. B. Lesperance, and died at same place on the 29th day of July, in the year 1838, leaving in full life her said husband, John B. Lesperance; that John B. Duchouquette and Joseph Duchouquette, two of the plaintiffs, are sons of the said Jean B. Duchouquette and Marie Brazeau, his wife; that the former was born at same place on the 1st day of December, in the year 1810, and the latter was born at same place on the 10th day of October, in the year 1808; that Theodore Papin, another of the plaintiffs, is the surviving husband of Celeste Papin, which said Celeste was a daughter of the said Jean B. Duchouquette and Marie Brazeau, his wife; was born on the 25th day of November, in the year 1802, at St. Louis aforesaid; was intermarried with said Theodore Papin, at the same place on the 25th day of October, in the year 1820, and died at same place on the 23d day of November, in the year 1833, leaving in full life her said husband Theodore Papin; that there was issue of the said marriages, between the said Jno. B. Lesperance and Elizabeth Duchouquette, and the said Theodore Papin and Celeste Duchouquette; and that the said defendants, at and before the time of the commencement of this suit, were in the possession of the said parcel of the said tract of land, and have taken to themselves the rents, issues, and profits thereof, and deny to the said plaintiffs any interest in the said land, or any share of the profits of same, claiming to themselves to be whole and sole owners thereof; and the jurors aforesaid, upon their oaths aforesaid, do further find that a marriage contract was executed between the said Joseph Brazeau and Marie Therese Delisle, previously to their intermarriage, to-wit: on the 6th day of November, in the year 1769, at Kaskaskia aforesaid, by which it was provided that the said Joseph Brazeau and Marie Therese Delisle have promised to take one another in the name and law of marriage, and to have the same made and solemnized in the Catholic, Apostolic and Roman church, as soon as possible; to be united and form one sole community in all the goods and chattels, moveable and immoveable, acquirements and purchases, conformable to their wishes, without having the power in any manner whatever

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to change or alter any thing to this disposition or settlement, although they should acquire other property, or remove into a country where the laws, usages and customs should be contrary, to which they do hereby expressly derogate and renounce; the said future spouses receive each other with all their rights and property whatever, such as they may have acquired, or shall hereafter accrue to them by inheritance from their father and mother, to whatever sum they may amount, of whatever nature they may be, and in whatever place they may be situate, even those they possess at this present time in their proper name, as also those which they may have in their own right, whether by gift or otherwise; the said future spouses do mutually give to the survivor of them, during life, all and singular, the property moveable or immoveable, purchases, or acquisitions, which may have been acquired by the said future husband and wife during the coverture, and even such as they hold in their own right, to whatever sums they may amount, of whatsoever value, or wheresoever situate, to be held and enjoyed by the survivor during his or her life, only in case, however, there should be no child or children living, or to be born of the said marriage, in which case of children, this present gift shall remain null in law.

And the jurors aforesaid, upon their oaths aforesaid, do further find that there was no child born of the said marriage between the said Joseph Brazeau and Marie Therese Delisle.

And the jurors aforesaid, upon their oaths aforesaid, do further find that on the 14th day of February, in the year 1817, the said Jean Duchouquette and the said Marie Brazeau, his wife, executed a writing, under their hands and seals, purporting to convey to Marie Therese Delisle, widow of Joseph Brazeau, in fee all their interest in the quantity of 1008 arpens, or the seventh part of said tract of land; that said instrument in writing was, on the same day acknowledged by the makers thereof, before the clerk of the Circuit Court, of the county of St. Louis, in the territory of Missouri; and that the wife of the said Jean B. Duchouquette was, previously to her acknowledgement, examined separate and apart from her husband, and by the officer taking her acknowledgement made acquainted with the contents of said writing, and upon such examination and information, declared that she executed the same freely, voluntarily, and of her own free will and accord, without fear, (constraint,) restraint, coercion, or undue influence of her said husband. And that the said writing, thus acknowledged, was on the 13th day of March, in the year last aforesaid, filed for record with the recorder of the county of St. Charles, in the territory of Missouri, and recorded; in

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which county the said tract of land was then situate; that on the 14th day of February, in the same year, the said Maria Therese Delisle, widow of Joseph Brazeau, deceased, executed a writing under her hand and seal, purporting to convey to Jean B. Duchouquette, in fee, all her interest in the quantity of 1008 arpens, or the seventh part of said tract of land; that said instrument of writing was, on the same day, duly acknowledged by the maker thereof, and on the 13th day of March, in the same year, duly recorded; that on the 20th day of March, in the year 1824, one Daniel Draper, styling himself collector of taxes for the county of Lincoln, in the State of Missouri, executed under his hand and seal, a writing purporting to convey to Henry G. Souldard, in fee, the said tract of land granted as aforesaid, to the said Joseph Brazeau, which deed was duly acknowledged and recorded; that on the same 14th day of February, the said Marie Therese Delisle, widow of said Joseph Brazeau, the said Jean B. Duchouquette, and the said Marie Brazeau, his wife, and niece of said Joseph Brazeau, executed a writing under their hands and seals, purporting to convey to Antoine Souldard, in fee, all their interest in the quantity of 5,040 arpens, or the five-sevenths of the said tract of land; that said instrument of writing was, on the same day, acknowledged by the makers thereof before the clerk of the Circuit Court of the county of St. Louis, in the territory of Missouri; and that the wife of the said Jean B. Duchouquette was, previously to her acknowledgement, examined separately and apart from her said husband, and by the officer taking her acknowledgement made acquainted with the contents of the said writing, and upon such examination and information, declared that she executed the same freely, voluntarily, and of her own free will and accord, without fear, restraint, constraint, coercion, or undue influence of her said husband, and that said writing, thus acknowledged, was, on the 13th day of March, in the same year, filed for record with the recorder of the county of St. Charles aforesaid, in which county the said tract of land was then situate, and on the next day recorded; that on the 25th day of November, in the year 1818, Antoine Souldard and Julie, his wife, Marie Therese Delisle aforesaid, widow of said Joseph Brazeau, and the said Jean B. Duchouquette, executed a deed to Mary E. Carter, Walter Coles, and Edward Coles, aforesaid, purporting to convey to them the said tract of land in the declaration mentioned, and that said deed was duly acknowledged and recorded; but whether on the whole matter, by the jurors aforesaid, in form aforesaid, found as regards the said parcel of said tract of land, in said declaration mentioned, which is situate in the county of Pike, the defendants are guilty or not, the jurors aforesaid are entirely

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ignorant, and thereon pray the advice and consideration of this Court, and if, upon the whole matter aforesaid found, it shall appear to the Court that the said defendants are guilty of the trespass and ejectment, in manner and form as in said declaration alleged, on and in said parcel of land, then the said jurors say, on their oaths aforesaid, that said defendants are guilty in manner and form as in said declaration alleged, on and in said parcel of land, and they assess the damage of the said plaintiffs, by reason thereof, to one cent; but if, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall appear to the Court aforesaid, that the defendants are not guilty of the said trespass and ejectment, as to the said parcel of the said tract of land, in said declaration mentioned, in manner and form as in said declaration alleged, the same jurors say, on their oaths aforesaid, that the defendants are not guilty of the trespass and ejectment, in said declaration alleged, on and in said parcel of said tract of land, in said declaration mentioned."

On this verdict the Court rendered judgment for the defendants, and the plaintiffs have brought the case to this Court by writ of error.

The contract of marriage between Joseph Brazeau and Marie Therese Delisle, was executed at Kaskaskia, in Illinois. At that time the French law prevailed at that place. Nothing more appearing than what is stated in the special verdict on the subject, we are warranted in saying they were domiciliated in Illinois. They afterwards came to Louisiana, where the Spanish law prevailed. The difference between the French and Spanish law of community is not very great. By the Spanish law, the husband and wife, by the mere act of intermarriage, became partners in all the estate, real and personal, which they respectively possess, except what the civil law calls the income and profits of public offices, civil or military, held by the husband, which belong exclusively to him. All that is acquired or purchased during coverture, whether real or personal, goes into partnership, as being presumed to be the fruits of the joint industry and economy of husband and wife. Not so with property acquired by devise, bequest, gift, succession or inheritance, this remains the separate property of the party to whom it accrues, because not the fruits of the joint industry. This is what the French law calls "*les propres*," which means separate property. *Acquets* and *conquets* mean the property jointly acquired. In all these respects the custom of Paris is the same with the Spanish law, except that the personal property, only possessed by the parties at the time of the marriage, enters into the partnership, as also *acquets* and *conquets* acquired during coverture, whether real or personal. But real property, held by either party at the time of



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the marriage, continues to be held separately, unless the contrary is stipulated. The result of this community or partnership, both at the Spanish and French law, is this: that on the dissolution of the partnership, the surviving party and the representative of the deceased, each take back what was brought on his or her side into the partnership, value or kind, in value of personal estate, in kind of real estate, and what remains, being considered as gains or profits, is equally divided as between partners.

This I understand to be the law relative to that community which exists between man and wife, by operation of law, uninfluenced by any contract. If the law itself would not place a gift from the king to either party in the community, does it follow that the law went farther and prohibited a donee from disposing of a gift in any manner he thought proper. The law of itself would not make a disposition of it, but because this was declined, it does not follow that he, to whom the gift was made, could not dispose of it, especially as that disposition was not to take effect until after his death. Such a restriction would very much impair the value of the gift. This is said upon the supposition that the concession to Jos. Brazeau was a royal gift. I do not know what should warrant us in saying so. In the absence of all knowledge as to the means by which the concession was obtained, are we to presume it was purely voluntary? Suppose it was for services rendered, or on conditions to be performed, are we to presume that they were performed at the expense of the husband alone, or may they not have been at the joint expense of the husband and wife?

If, then, the land conceded to Joseph Brazeau entered into the community established by contract between him and his wife, at the time of the marriage, then the land in controversy, at his death, belonged one half to his wife, and the other half went to his niece, Marie Brazeau, under the will, subject to a life estate of the wife. But this matter of the life estate of Mrs. Brazeau in Marie's, the niece's half, may be thrown out of the consideration, as it only serves to embarrass, and does not otherwise affect the question.

Then Madam Brazeau, and Douchouquette and wife, conveyed five-sevenths of the land to Soulard. As Madam Brazeau owned one-half of the land, and Douchouquette and wife the other half, we must suppose that Madam Brazeau conveyed one-half, and Douchouquette and wife one-half, of what was granted. This would leave one-seventh remaining in Mrs. Brazeau, and one-seventh in Douchouquette and wife. Then Douchouquette and wife convey one-seventh to Madam Brazeau. Thus

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all title and interest is out of Mrs. Douchouquette, under whom the plaintiffs claim. Madam Brazeau conveyed one-seventh to Mrs. Douchouquette.

The counsel for the plaintiffs contended that the land devised by Brazeau to Mrs. Douchouquette, did not enter into the community. If it did not enter into the community, then clearly it was *paraphernal*, and if *paraphernal* it might be conveyed by the husband and wife. *Lindell vs. McNair*, 4 Mo. R. 380. But, if by the marriage contract, the land entered into the community, then the husband and wife, by joining, passed the title to Madam Brazeau and Soulard. By supposing that the order of the conveyances between Madam Douchouquette and her husband, and Madam Brazeau, different from that before stated, that is, that Madam Brazeau first conveyed one-seventh to Douchouquette and wife, and they afterwards conveyed one-seventh to her, it will appear that one-seventh remained in Douchouquette and wife, to the half of which Madam Douchouquette would be entitled, and consequently the plaintiffs entitled to recover one-fourteenth. But the order of time, in which the conveyances were made, is not stated, and as, in this Court, the presumption is that the judgment is for the right party, and he who would gainsay it, must show the error of the judgment below, we will not be warranted in disturbing it unless something is shown which would sustain our action.

It will have been seen that this case depends on the question settled in the case of *Lindell vs. McNair*, before cited. Whatever may be thought of that opinion, if the question was now for the first time to be settled, we consider it has been too long determined, and too many rights may now rest upon it, to make it expedient to disturb it.

Judge NAPTON concurring, the judgment will be affirmed.

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MARR vs. HILL & HAYNES.

The declarations of a slave, in connection with, and explanatory of a symptom or appearance of disease, are competent evidence to prove that the slave was at the time diseased, in an action brought against a purchaser for the purchase money of the slave.

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## APPEAL from Monroe Circuit Court, (In Chancery.)

KIRTLEY *for Appellant.*

The errors assigned and insisted on for a reversal of the decree, are —

1st. The admission by the Court to the jury of incompetent and improper evidence given by complainants and objected to by defendant.

2nd. That the Circuit Court gave for complainants improper instructions, objected to by defendant.

3rd. That the Circuit Court improperly overruled defendant's motion to set aside the finding of the jury, and for a new trial of the issues.

4th. That the Circuit Court improperly decreed for complainants, and made the injunction perpetual.

HOWELL *for Appellees.*NAPTON, J., *delivered the opinion of the Court.*

This was a bill in chancery to enjoin a judgment at law obtained by Jefferson T. Marr, administrator of Henry Marr, deceased, against the complainants, Hill and Haynes. The note upon which the judgment had been rendered, was given by the complainants in consideration of a negro woman and her infant child, bought by said Hill at the administrator's sale. The bill charged that this negro woman was unsound at the time of the sale; that this unsoundness was known to the defendant, Marr; that she was represented by the crier to be sound, by the directions of said Marr, and the purchase was made under the influence of these false and fraudulent representations. The answer denies the allegation of unsoundness and fraudulent representations. Under the provisions of the chancery practice act, as they stood at the trial, the complainant and defendant put down the several issues they desired to be determined, and their issues were submitted to a jury. The verdict of the jury was, that the defendant, Marr, did request the crier to represent the negro woman in controversy as sound and healthy, and that said crier did so represent her in the hearing of complainant and other bystanders; that said woman was not sound or healthy at said time, but diseased, and of no value; that said defendant, Marr, knew the said woman to be unsound and unhealthy, and caused the representations of her health to be made by the crier for the purpose of alluring bidders and defrauding them. In consequence of which verdict the Chancellor

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decreed in accordance with the prayer of the bill, and perpetually enjoined so much of the judgment as covered the value of the woman.

Upon the trial of the issues before the jury, certain portions of the testimony were objected to. One *Davis* testified that he had boarded several weeks with Henry Marr, (the testator,) and had known Marr to chastise the woman frequently for her obstinacy and complaints. On being interrogated in relation to the character of these complaints, the witness answered, that he had heard the woman make complaints to her mistress *about her health*, and say *her master put too much on her for her health*. Another witness, Pavy, saw the woman at his house shortly before her sale at public auction, and told her he wanted to hire her, but she told him she would not suit him, as she was unwell more than people thought. The witness told her she was breeding, to which she replied, "there was something else." Mrs. Bryant, another witness, testified that she was *laughing at and plaguing* the negro woman, (in relation to her supposed pregnancy, it may be inferred,) when the negro bursted into a cry, and said, "no, Miss Mary, there is something worse the matter with me, but they all don't believe it."

These were the several items of testimony admitted, to which exceptions were taken.

It appeared from the evidence that a few months after the sale, the negro woman was found to be diseased with the dropsy, of which disease she died. The evidence detailed above was for the purpose of showing the existence of this disease before the sale, and the knowledge of its existence by Marr, the defendant. There was also other evidence tending to this same purpose, but not being excepted to at the trial, it is needless to rehearse it.

The bill of exceptions shows that a number of instructions were asked for and given on both sides, but the instructions themselves are not preserved, except four, which were objected to, and to which exceptions were taken. These in substance declared to the jury, that if they were satisfied of the unsoundness of the slave at the sale, and that the defendant knew it, or had the means of knowing it, or had reason to believe that the woman was unsound, &c., they must find that issue for complainant.

The only points presented by the case are those arising out of the admission of the statements of the negro and the instructions of the Court. The first point has been decided differently in different Courts. *Turney vs. Knox*, 7 Mon. 88; 4 McCord's S. C. R. In the case determined by the Supreme Court of Kentucky, a majority of the Judges

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excluded such testimony:—Judge Bibb placing its exclusion upon the ground that the negro himself, had he been alive, could not have been examined; and Judge Mills conceding that such declarations would have been admissible, had they been made to a surgeon or physician. Judge Owsley considered the testimony admissible as a part of the *res gestæ*. We are unable to see any reasonable objection to such testimony, when it is strictly limited to the point it is designed to elucidate. The question is as to the nature and character of the disease under which the negro labors, or whether there is any disease at all. In addition to the appearances and actions of the patient, what can better show this than his exclamations or declarations as to the afflictions or pains suffered? They are a part of the *res gestæ*, and are as much so when made in the presence of an unprofessional observer as when made to the physician or surgeon who is in attendance. The mere declaration of a slave that he or she was in bad health, unaccompanied with proof of any symptoms or appearance, indicative of a disease, would be clearly inadmissible; it would be mere hearsay, and could not be permitted to effect the rights of the owner or any one else. But the declarations made to the witness Pavy, and to Mrs. Bryan, are not of this character. It must be inferred from their statements, though it is not so stated in direct terms, that the woman about whom the present controversy has arisen, had the appearance of being in a state of pregnancy, and that the witnesses were disposed in a good humored way to rally her upon her supposed situation. What more expressive proof could be given of the woman's own convictions, that a more dangerous and fatal cause produced these symptoms, than "her bursting into tears," and declaring that something worse ailed her? We do not see any objections to the declarations made to either of these witnesses, but the declarations testified to by Davis, as they were not explanatory of any symptoms or appearances of ill health noticed by the witness, are certainly liable to objection.

The phraseology of the instructions has been objected to, because the jury were told that if the defendant knew, or had the means of knowing the unsoundness of the negro, &c., he was liable to the action. This objection has but little weight—the jury had previously to find that there was a representation of soundness made by the defendant or his agent; that this representation was false, and surely, if the false representation was made in relation to a matter about which the defendant might have easily informed himself, his knowledge of its falsity would be presumed. Indeed, it might be questioned whether the issue in relation to the defendant's knowledge of the slave's unsoundness was not entirely immaterial.



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If the false representation amounted to a warranty, it was certainly superfluous to enquire farther into the defendant's knowledge of its falsity. But supposing the issue material, the instruction is substantially correct, as the only mode in which a jury could ascertain the fact of the defendant's knowledge of the negro's disease, would be to ascertain that he was in a situation in which, in all human probability, he must have known it. If, therefore, the jury were convinced that the defendant had the means of ascertaining what was the character and condition of the slave's health, or in other words, was placed in such a situation, or stood in such a relation to her as would almost preclude the possibility of such a disease escaping his observation, they would be well warranted in concluding that the defendant did know at least enough to have deterred him from selling her as a sound negro.

Judge McBRIDE concurring, the judgment of the Circuit Court is affirmed.

CRIGLER, ET AL. VS. QUARLES.

*Nil debit* is not a good plea to an action of debt on a Sheriff's bond.

APPEAL from Howard Circuit Court.

CHILTON & CLARK, for Appellants, insist:

1st. The Court erred in striking out the plea of *Nil debit*, filed by the said appellants to the declaration, because the suit was brought upon a Sheriff's bond—which was only the inducement to the action, and therefore *Nil debit* was a good plea, and should not have been stricken out by the Court. See 1st Chitty's Pleadings, 518. See also 11 Johnson's Rep. 414. See Revised Code of 1835, on penal bonds.

2nd. The Court erred in permitting the execution set out in the bill of exceptions to be read in evidence, because it contained no return day, and because it is not an execution issued in conformity to the law in such case made and provided.

3rd. The Court erred in permitting said plaintiff in the Court below to read as evidence the copy of the transcript from the docket of Joseph N. Laurie, a Justice of the Peace, because the same was irrelevant, and because it does not purport to be a copy of said Laurie's docket, but a copy of a transcript of said docket. See Revised Code in regard to copies.

4th. The verdict and judgment of the Court in this cause was, and is, contrary to the law and the evidence in the case, and should have been for the defendants, for the following reasons:—

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There was no proof offered to show that the Sheriff was applied to for the said execution, either on or before the first day of the then next succeeding term of said Cooper Circuit Court, by said Quarles, or any one for him, and the law does not compel a Sheriff to go out of his bailiwick to make return of an execution. Neither does it provide that a deposite of an execution in the Post Office, directed to the Clerk of the Court in another County by whom it was issued, shall be any evidence of a return. The law providing for sending and directing an execution to any County in the State, does not impose upon the Sheriff of a distant or other County than that in which the execution was originally issued, the duty to make return of such execution. See Rev. Code, title "Execution," page —. See 1st Aiken, 258, Vermont Reps. The law does not compel a Sheriff to perform any official duty out of his bailiwick.

5th. The Court erred in rejecting the evidence offered by the defendant below, because under the state of the pleadings, it was relevant to show that the said Sheriff had not broken the conditions of his said bond, and to show that he had faithfully served and executed said execution within his bailiwick according to law. See Rev. Code, title "Executions."

6th. The Court erred in refusing to exclude the evidence of the witnesses, Trigg and Clark, because the same was irrelevant and inadmissible, and should have been rejected by the Court, because both stated that Crigler was Sheriff of Howard County, and had failed to make return of an execution to a County out of his bailiwick.

*HAYDEN, for Appellee, insists :*

1st. That the plea of *Nil debit* was not a good plea to the action of the plaintiff, and that the Court did right in striking it out upon the motion of the plaintiff. See 7 Mo. Rep. 194—5.

*McBRIDE, J., delivered the opinion of the Court.*

This was an action of debt on the official bond of the appellant, Crigler, late Sheriff of Howard County, to recover the amount of an execution issued from the office of the Clerk of the Cooper Circuit Court, in favor of Quarles, and against Isaac N. Bernard, and placed in the hands of the late Sheriff of Howard County for collection.

The declaration assigned several breaches, amongst others the failure of the said Sheriff to return said execution in obedience to the command therein. The defendants below filed two pleas, *non est factum* and *nil debit*. Issue was taken on the first plea, and a motion was made to strike out the plea of *nil debit*, which was sustained, and the plea was struck out by the Circuit Court, and that is the error assigned, and mainly relied upon now, to reverse the judgment of that Court.

This question has heretofore been presented to this Court, and we are now called upon to review the decision then made. In the case of Parks and others vs. The State of Missouri, 7 Mo. Rep. 195, the Court say that "*nil debit* is a bad plea to an action of debt on a bond with collateral conditions," and refer to 1st Chitty, page 518.

It is laid down in the reference to Chitty's Pleadings, that in debt on

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a *specialty*, it has been considered that there is a material distinction between those cases in which the deed is only *inducement* to the action, and *matter of fact is the foundation* of it; and those in which the deed itself is the foundation, and the fact merely inducement. In the former case, as in debt for rent due on an indenture of lease, though the plaintiff had declared setting out the indenture, yet as the fact of the subsequent occupation or holding, gave the right to the sum demanded, and was the foundation of the action, and the lease was mere inducement, the defendant might plead *nil debit*. For the same reason that plea was sufficient in debt for an escape, (except where the defence was a recaption,) or on a *devastavit* against an executor; the judgment in these actions being merely inducement, and the escape or *devastavit*, the foundation of the action.

But when the deed was the foundation of the action, although extrinsic facts are mixed with it, the defendant, if he deny the execution of the deed set forth in the declaration, should plead *non est factum*, and *nil debit* was not a sufficient plea; as in debt for a penalty on articles of agreement, or on a bail bond, or on a bond setting out the condition and breach.

To support the text, reference is made to 2nd Salk. 565; 1 Sand. 38, N. 3, 219—276. N. 1, 2, 202—211. 2 ib. 187, a note 2, 299. N. 1, and the authorities there referred to, which will be found on examination to sustain fully the text.

Having established the fact that a distinction exists, where the deed is the *foundation* of the action, and where it is merely *inducement* thereto, we shall endeavor to ascertain what relation the bond in this case sustains to the action; and for this purpose a resort will be had to the application of the rule, as made by the Courts, where the point has been presented.

The first case to which we would refer, is to be found in 2 Strange's Rep. 778, and was an action of debt on a specialty for the penalty, for not accepting and paying for stock, according to a contract. The plaintiff averred performance of every thing on his part to entitle him to the action:—the defendant pleaded *nil debit*, to which the plaintiff demurred, and judgment for plaintiff. After this case had undergone argument at four different terms of the Court, the plea was finally adjudged bad. See 2 Ld. Ray'd, 1500. 8 Mod. 106.

In the case of *Sneed, et al. vs. Wister, et al.*, 8 Wheaton's Rep. 690, which was an action of debt upon a bond, with a penalty, with condition that the obligor should prosecute his appeal, &c., the averments were

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that he did not prosecute, &c. The second plea was *nil debit*, to which the plaintiff filed a demurrer, the Court held the plea to be clearly bad, "no principle of law being better settled than that this is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action."

The case of *Bullis, adm'r vs. Giddens, et al.* 8 John. Rep. 83, was an action of debt on a recognizance of bail. The defendant pleaded *nil debit*, to which there was a demurrer and joinder, and the only question was whether such a plea is good. The Court held it not to be a good plea, and base their decision on Chitty's Pleadings, 518, and the authorities there cited.

In the case of *Minton, qui tam, &c. vs. Woodworth and Ferris*, 11 John. 473, which was an action of debt brought by the plaintiff, who sued as well, &c., as assignee of the late Sheriff of *Cayuga*, on a bond for the gaol liberties, executed by *Woodworth* and *Ferris* as his security. The defendant pleaded, among other pleas, that of *nil debit*, to which the plaintiff demurred. The Court recognizing the correctness of the general rule contained in Chitty's Pleadings, and referring to the case in 8 John. 83, held, that the bond in this case was mere inducement, and that the escape was the foundation of the action. Whilst this case may be supposed to conflict with the principle asserted in the case in 8 John. 83, above referred to, yet the Supreme Court of New York evidently do not so consider it, either by any direct declaration therein contained, or by any expression subsequently expressed by that Court, where the question has been presented.

*Jausen, Supervisor, &c. vs. Ostrander, et al.* 1 Cowen, 670, was an action of debt on a bond with a penalty, and a condition under written, executed by the defendant as collector, &c., and the other defendants as his sureties to the Supervisor.

The declaration set forth the condition of the bond, assigned breaches, with the necessary averments, to show that the defendant, *Ostrander*, had forfeited the bond, by not accounting for the whole tax. The defendants filed their plea of *nil debit*. In commenting on this point the Court say "it was contended on the argument, that the plea of *nil debit* was not a denial of the bond." To this it may be answered, that such a plea to a bond, setting out the condition and breach, is bad, and may be demurred to; but if this is omitted, the plaintiff must prove every allegation in his declaration. See 1 Chitty, 477. 2 Saund. 187, a note 2. 5 Esp. Rep. 38.

*Bradford vs. Ross*, 3 Bibb, 238, was an action by petition and sum-

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mons on a promissory note, and the plea of *nil debit* filed, which was rejected by the Circuit Court. The Court of Appeals in reviewing the case, say: "the second point we shall notice is, whether *nil debit* was an admissible plea to the action. The note upon which the action is founded, was given after the passage of the act to amend the law of proceedings in civil cases, approved February 14, 1812. By the 8th section of that act, all writings thereafter executed, without seal, for the payment of money or property, or for the performance of any other act, are placed upon the same footing with sealed instruments, and to all intents and purposes invested them with the same force and effect. This act having raised an unsealed instrument, in all respects to the dignity of a specialty, it necessarily follows that no plea can be admitted as a defence to an action founded upon such an instrument, which would not be admissible to an action founded upon a specialty; and as *nil debit* is not a good plea to an action upon a bond or other specialty, it was consequently not admissible in this case, and the Court below acted correctly in rejecting it."

*Brents, &c. vs. Sthal*, 3 Bibb, 482, was an action upon a Sheriff's bond. The declaration made profert of a copy of the bond, and after setting forth the penalty and condition thereunder written, alleges for breaches thereof, the non payment of money collected by the Sheriff, on two several executions, in favor of the plaintiff, &c. The defendants pleaded several pleas, one of which was *nil debit*. To this plea the plaintiff demurred, and the Court sustained the demurrer, and adjudged the plea bad. The action of the Circuit Court in sustaining the demurrer to the plea of *nil debit*, was assigned for error. In noticing this assignment, the Court say, "there can be no doubt that the plea was bad," and refer to the principle which we have extracted from Chitty's Pleadings, p. 518.

This latter case is directly in point with the case at bar, and entirely sustains the action of the Circuit Court in striking out the plea of *nil debit*.

The reason assigned in the books why the plea of *nil debit* should not be allowed, is, that it would make it extremely difficult for a plaintiff to recover, as it would put him upon the proof of every fact necessary to the maintainance of an action on a parol contract. The solemn deed of the party, not concluding the defendant in any wise, the plaintiff would have to look every way and consider from how many quarters he is liable to be attacked. If the defendant denies the bond sued on, he must resort to his plea of *non est factum*; if his defence be based on a per-



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formance of the breaches alleged, he must plead such defence specially, which will advise the plaintiff what he is required to prove to entitle him to a judgment.

In a case reported in 3 J. J. Marsh. 600, which was an action of debt on a Virginia record, and the plea of *nil debit* filed—the Court draw a distinction between judgments obtained where the defendant was personally served with process, and where the judgment was obtained by constructive service, or a proceeding in *rem*. To an action brought on the former, the plea would be inadmissible, as the defendant would be precluded from going behind the judgment to show that he was not indebted; whilst to an action brought upon the latter class of judgments, affording only *prima facie* evidence of indebtedness, the plea would be good in order to let the defendant disprove the judgment. In the former case the judgment is the foundation of the action; in the latter case the original indebtedness is the foundation, and the judgment mere inducement.

We conclude, therefore, that upon principle, and according to the adjudications of the Courts, the plea of *nil debit* was bad in the case now before us, and that the Circuit Court committed no error in striking it out.

There were other points raised by the parties, but which were not pressed, and being of minor importance, we have not investigated them.

The plea of *nil debit* not being admissible, and having been struck out by the Circuit Court, the breaches in the declaration were taken as confessed, there being no other plea, and all the plaintiff had to do was to read the bond and prove the fact of the Sheriff having failed to return the execution.

The other Judges concurring herein, the judgment of the Circuit Court is affirmed.

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WILSON vs. JACKSON, ADM'R.

1. The judgment of a sister State is *prima facie* evidence of jurisdiction of the person, where the writ was returned "executed," although such return may be informal.

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2. It is not sufficient in an action upon such judgment, for a plea to the jurisdiction of the Court rendering the judgment, to aver that the defendant was *not a resident of the State*, it must also be shown that he was not in the State.

### ERROR to Lafayette Circuit Court.

HAYDEN, *for Plaintiff, insists:*

1st. The Court in Virginia had no jurisdiction of the person of the defendant, and could not have had, without the actual service of the original process upon the defendant by the Sheriff according to the command of the *capias*. It is the service of the process upon the defendant which could alone give the Court jurisdiction, unless the defendant had appeared to the action. See 2d Cowen, 477, and note to the case. 2 Mass. R. 195. Graham's Practice, 121—2.

2nd. That if the Court had no jurisdiction of the person of Wilson, the judgment is void, and the record of the judgment is *no record* against him, and consequently is no evidence that he owes the debt therein adjudged against him.

3rd. The fact of the service of the process upon the defendant by the Sheriff according to the command of the writ, is a fact which should appear from the record itself, and cannot be supplied by parol proof on the part of the plaintiff: but if it appear from the record, the fact thus appearing is not conclusive, but is only *prima facie* evidence of the truth of the fact, and may be contradicted by proof on the part of the defendant. See 19th Mass. R. 388. 2 do. 154. 9th Mass. Reps. 236. 1 do. 86.

4th. The issue upon the special plea of the defendant which denies the jurisdiction of the Court in Virginia, requires of the plaintiff to prove the *fact of jurisdiction* from the record itself, and the record furnishes no such evidence. It should show as evidence that the Sheriff, by virtue of the writ, took or arrested the defendant by his body before the return day of the writ, within the body of his County, and that he read the writ to him, or declared to him the contents thereof, at the time of the service of the writ. 6 Bacon, 168, N. The question is a mixed question of law and fact, and a proper question for the decision of a jury under the instruction of a Court; and the pleas of the defendant which raise the question, are good pleas. The question does not depend upon the mere fact whether the defendant had notice of the suit against him in the sister State, but the question is, whether the party had *legal notice*, such as would give jurisdiction to the Court. If the pleas had been that the defendant had *no notice*, the pleas would have presented a broader issue than the law of the case required, and the defendant was not bound to make such issue with the plaintiff. See 6 Wendell, 447. The plea in the case in Wendell is identical with the plea in the case at bar, and was demurred to, and decided good. See 5 Wendell, 157—8.

5th. All returning officers, such as Sheriffs, are bound to return facts—specifically showing how, when, &c., they execute process placed in their hands to execute. See 12 Pick. 211. 1 Mass. Reps. 87—88.

6th. As the pleas at bar are both good against the whole action, and one is demurred to, and the facts thereby admitted as stated in the plea, this Court is bound to render such judgment here as the Circuit Court ought to have rendered, viz: a judgment of *nil capiat* for defendant. This is the judgment of the law upon such a state of pleadings, and which the Court was required to pronounce, and not having so done, the defendant has appealed to this Court to pronounce the same, or to reverse the judgment, and remand the cause and require the Judge below to pronounce the judgment of law in lieu of his *own judgment*, which was against law. See 1 Saunders, 80—81, N. (1.) Do. 109, N. (A.) 2nd Saunders, 300, N. (3.)

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**LEONARD & BAY, for Defendant, insist:**

1st. The third plea is bad. It seeks to avoid the judgment on the ground that the notice given the defendant was not a legal notice, and refers the question of the legality of the notice to a jury, instead of submitting it to the Court. 1 Chitty's Pleadings, 244. Starbuck vs. Murray, 5 Wend. R. 159.

2nd. If it be a good plea, it is, substantially the same as the fourth plea, and upon that plea issue was taken, *tried*, and found against the defendant; he had, therefore, under that plea the benefit of the same defence he has set up in his third plea, and, of course, the decision of the Court against the plea upon the demurrer did not prejudice him, and cannot be assigned for error.

3rd. If it be insisted that the fact of "non residence," stated in the third plea and omitted in the fourth plea, (which is the only difference between the two pleas,) is essential to constitute the other facts in the *plea* a good defence, it is now apparent that the rejection of the third plea has not prejudiced the defendant, for on the third trial the fourth plea has been found against him, and of course his third plea must have shared the same fate.

4th. The transcript of the Virginia judgment was rightly received in evidence, and if the defendant was subject to the jurisdiction of the State of Virginia, that judgment has the same effect in all respects in this State that it possesses in the State of Virginia. Mills vs. Duryee, 7 Cranch, 481. Hampton vs. McConnell, 3 Whea. 234. Shumway vs. Stillman, 6 Wend. R. 453. Gleason vs. Dod, 4 Met. Rep. 333. Hall vs. Williams, 6 Pic. R. 232. Bissell vs. Briggs, 9 Mass. Reps. 462. Aldrich vs. Kinney, 4 Conn. Reps. 380. Miller vs. Miller, 1 Bailey's Reps. 244. Clark vs. Day, 2 Leigh Reps. 172.

5th. The Sheriff's return upon the *capias* is evidence that the defendant had notice of the suit against him, and the Court therefore properly so declared. 8 Mo. Reps. 209. State use of Relfe vs. Perryman.

6th. The record expressly alleges that the defendant was *arrested*; and if this be not conclusive, it is certainly *prima facie* evidence of the fact of notice, and there was no evidence to repel that presumption.

7th. If all this be otherwise, the presumption from the fact of the judgment itself is, that the defendant was duly notified, unless the contrary appears on the transcript, or is established in proof, and neither of these positions are assumed. Shumway vs. Stillman, 4 Cow. Reps. 292. Same vs. Same, 6 Wend. Reps. 447. Scott vs. Coleman, 5 Litt. Reps. 350. Williams vs. Preston, 3 J. J. Marshall, 600.

**NAPTON, J., delivered the opinion of the Court.**

Mary S. Jackson, administratrix of John G. Jackson, deceased, brought an action of debt against Wilson, the plaintiff in error, on the record of a judgment rendered in Virginia. The defendant below pleaded *nil tiel record, nil debit*, and two special pleas. The first special plea set up as a defence, that the defendant was not a resident of the State of Virginia at the time of the commencement, or at any time during the pendency of the suit in the said Circuit Superior Court of law and chancery, of Harrison County, in the State of Virginia, in which said suit the said judgment was rendered, and that he (the defendant,) had no legal notice served on or given to him, to appear and defend the said suit, and never waived notice or appeared to the said action in the said Court, or in any

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manner submitted himself to the jurisdiction of said Court. The second special plea was, that the defendant had no legal notice, and never waived notice, or appeared to the said action, or in any manner submitted himself to the jurisdiction of the Court, &c. The plaintiff demurred to the plea of *nil debit*, and the two special pleas; the plea of *nil debit* was withdrawn, and the demurrer sustained to the first special plea, and overruled as to the last. Issue was joined on the plea of *nul teil record*, and the plaintiff replied to the last special plea, first, that the said defendant did have legal notice, &c., and secondly, that before the recovery of the judgment in the Harrison Court, the plaintiff sued out her writ of *capias*, by which said writ the Sheriff was commanded to take the body of the said Wilson, &c., which said writ was delivered to the said Sheriff to be executed, and was duly and legally served, and was on the return day thereof, according to the law of Virginia, returned "executed," and so the defendant had legal notice, &c. To this second replication the defendant demurred, and the demurrer was sustained.

The case was submitted to the Court without the intervention of a jury. The plaintiff gave in evidence a record of the judgment of the Superior Court of law and chancery in Harrison County, Virginia. The return to the writ of *capias* was "executed." The plaintiff also read parts of certain Virginia statutes from the Revised Code of 1817. The Court, at the instance of the plaintiff, declared the law to be, that the return of the Sheriff on the writ of *capias* in the transcript of the record in evidence, was evidence that the said defendant had notice to defend said suit. The Court also, at the defendant's instance, declared its opinion, that the issue must be found for the defendant, unless the evidence was satisfactory that he was served with process, and had notice to appear in the said Circuit Superior Court of Harrison County. The issues were found for the plaintiff, and a judgment rendered accordingly. A motion for a new trial was unsuccessful, and the case comes here by appeal.

Since the case of *Mills vs. Duryee*, (7 Cranch, 481,) the Courts of the several States have assumed to act upon the principle, supposed to be decided in that case, that the judgment of one of the State Courts is of the same dignity in every other State, as in the one where it was pronounced. In that case it appeared from the record that the defendant had been arrested and given bail, and therefore had full notice of the suit. In *Bissell vs. Briggs*, (9 Mass. Reps. 462,) which was decided about the same time with the case of *Mills vs. Duryee*, the Supreme Court of Massachusetts considered the record of the judgment conclu-

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sive as to every thing except the jurisdiction of the Court, which was allowed to be questioned under the plea of *nil debit*. In this respect, that Court admitted a distinction between judgments of another State and domestic judgments. Previous to these decisions it had been repeatedly held in New York, that the judgments of sister States stood upon the same foot with foreign judgments, and that the only effect of the fourth article of the Constitution of the United States, and the act of 1790, passed in pursuance thereof, was to facilitate the mode of proving such judgments. *Hitchcock vs. Aikens*, 1 Caine's Reps. 46. *Kilburn vs. Woodworth*, 5 Johns. Reps. 37. *Robinson vs. Ward's ex'r*, 8 J. R. 86. But in *Andrews vs. Montgomery*, (19 Johns. Reps. 162,) and in all the subsequent cases, the Courts of that State adopted the opinion pronounced in *Mills vs. Duryee*. It is agreed, however, by all or nearly all the cases decided in the State Courts, both before and since the case of *Mills vs. Duryee*, that the want of jurisdiction in the Court pronouncing the judgment may be shown for the purpose of impeaching its validity, and this opinion is maintained as entirely consistent with the construction which the federal Courts have given to the act of 1790. In New York it is held, that although the record itself shows that the defendant was served with process, or appeared to the action, yet this being a fact upon which the jurisdiction of the Court depends, may be denied by a special plea. The argument to sustain this position is thus stated by Judge Marcy in *Starbuck vs. Murray*, 5 Wend. Reps. 148:—"If the defendant had not proper notice of, and did not appear to the original action, all the State Courts with one exception agree in opinion that the paper introduced, as to him, is no record; but if he cannot show even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant:—the paper declared on is a record because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of State authority shows it to be a proper issue,) is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record, from disproving any one allegation contained in it. Unless a Court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought, therefore, not to be es-



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topped by any allegation in that record from proving any fact that goes to establish the truth of a plea, alleging want of jurisdiction. So long as the question of jurisdiction is in issue, the judgment of a Court of another State is, in its effects, like a foreign judgment; it is *prima facie* evidence; but for all the purposes of sustaining that issue, it is examinable into to the same extent as a judgment rendered by a foreign Court. If the jurisdiction of the Court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit." This reasoning brings the learned Judge to the same conclusion which C. J. Parsons arrived at, in the case of *Bissell vs. Briggs*, except that Judge Parsons admitted the defence of want of jurisdiction to be given in evidence under the plea of *nil debet*, and considered the admission of such a defence as distinguishing these judgments of another State from mere domestic judgments. Judge Cowen, in his collation of the authorities on this point, (Cowen and H. notes to Phillips, p. 860, note 551,) notices with approbation this opinion of Judge Marcy, and adds, that "a want of jurisdiction in the Court pronouncing a judgment may always be set up when it is sought to be enforced, or when any benefit is claimed under it, and the principle which ordinarily forbids the impeachment or contradiction of a record, has no sort of application to the case." The authorities cited by the learned commentator in support of this proposition, are cases which merely sustain the general principles that a judgment pronounced by a Court which has no jurisdiction is a nullity, and that such want of jurisdiction may be shown where the judgment is one of a tribunal foreign to that where it is sought to be enforced. In no one of the cited cases is it shown, that in a suit on a domestic judgment, the defendant is at liberty to dispute the jurisdiction of the Court, when it appears on the face of the record that the Court had jurisdiction. The whole argument of Judge Marcy in the case of *Starbuck vs. Murray*, assumes, that to allow a denial of the jurisdiction of a Court is necessarily to permit the introduction of parol proof to contradict the record, whilst it is quite obvious that cases may happen in which the record either is silent as to such facts as would give the Court jurisdiction, or expressly shows the non-existence of those facts, and consequently the jurisdiction of the Court may be impeached without impeaching the verity of the record. Is there any thing monstrous in the proposition, that a record should be conclusive on the question of jurisdiction, any more than it should be conclusive of other facts equally fatal to the interests of the party to be affected by the judgment? If a suit be brought in New York on a judgment of a Court of general juris-

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diction of that State, and it appears on the face of the record, that the defendant was duly summoned or served with process, or appeared to and defended the action, could the defendant plead that he never appeared or had notice of the suit? If such a plea be inadmissible, could it be admitted in another State where that judgment might be sued upon, consistently with the doctrine in *Mills vs. Duryee*? In *Green vs. Sarmiento*, (1 Peters's C. C. R. 74,) Judge Washington said:—"If the law of any State does not prohibit such an outrage upon the immutable dictates of justice, as the exemption of any judgment from re-examination, which may have been *ex parte*, the defendant having had no opportunity to make his defence, then the Court which inadvertently gave the judgment, or a superior Court would provide the redress, and if the law or the Courts should leave the injured party without a remedy, and the Courts of another State would be bound to consider such judgment as conclusive, (on which point the Judge gave no opinion,) then the act of 1790 was not passed with sufficient consideration, and it may, and ought to be so amended as to give a conclusive effect to judgments only in cases where the trial was perfectly fair, and where both parties were or might have been heard." The same Judge held in *Field vs. Gibbs*, (1 Peters's C. C. R. 155,) that where the record of the judgment stated the defendant appeared and pleaded by attorney, that it could not be contradicted. Such, also, seems to be the doctrine in *Massachusetts. Hall vs. Williams*, 6 Pick. R. 232.

Conceding, however, such defences to be admissible, and that the doctrine in New York is entirely consistent with the opinions of the federal Courts on the construction of the act of 1790, the special pleas of the defendant are still not altogether free from objection. They allege that the defendant was not a resident of Virginia either at the time this suit was commenced or since, but they do not allege so clearly and distinctly as the rules of pleading require, that he never was within the State of Virginia, so that a writ could have been served upon him. It is true that the pleas contain the allegation that no *legal* notice was served upon the defendant; but this is leaving a question of law to be determined by the jury. And it is admitted, that a citizen of another State, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may justly be subjected to its process, and bound personally by the judgments of its Courts. If, therefore, the defendant, though not a citizen of Virginia, was at any time within the territory of that commonwealth, and whilst there was served with the process of her Courts, the judgment of such

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Court would bind him personally, and this the defendant was bound to deny by his plea, according to the New York authorities.

The Circuit Court, however, decided the second special plea to be a good one. Why that plea was considered good and the first special plea held bad, we are unable to conjecture. It is sufficient that the defendant was not prejudiced by this decision, inasmuch as the proof which devolved upon him under the second special plea was less burthensome than that which might have been requisite under the first. The only question, then, which the Circuit Court decided of which the defendant below could complain, is the opinion expressed by the Court on the trial of the issue, that the Virginia record was *prima facie* evidence that the defendant had notice of the suit.

If it is to be considered as the settled construction of the Constitution and the act of Congress, that the judgment of a neighboring State is to be treated in all respects as though the Court before which it is brought were sitting and acting under the laws of the State where it was rendered, the enquiry is naturally suggested, how is the law and usage of the State, where the judgment was rendered, to be ascertained? Will the Courts take judicial cognizance of the laws of other States?—or must the local laws and usages be proved, as other facts, and if so, upon which party will the burthen of proof devolve? It seems that the Courts which have adhered most closely and literally to the doctrine of the federal Court in *Mills vs. Duryee*, have indicated a decided leaning in favor of the former position. *Clark and others vs. Day*, 1 Leigh, 172, *Curtis vs. Gibbs*, 1 Pennington R. 399. Judge Cowen observes, (3 Phil. Ev. p. 902,) that “all the decisions which have been made, overruling the plea of *nil debit*, when pleaded to a declaration on the judgment of a neighboring State, seem to us as virtually maintaining the domestic character of such judgments, to the extent of requiring the Court which is to pass upon its effect, to take judicial notice of the local law upon which that effect depends. For how else can it be determined *upon demurrer*, that *nil debit* is improper?”

The plaintiff in error insists that the return of the Sheriff to the writ of *capias* as it appears upon the Virginia record, is entirely insufficient; that the law requires all officers in making their returns to return facts, specifically showing the time, manner and place of executing the same. In support of this position we are referred to several cases decided by this Court. *Charless vs. Marney*, 1 Mo. Reps. 382; *Hickman vs. Barnes*, 1 ib. 110; *Blanton vs. Jameson*, 3 M. R. 38. These are all cases in which the regularity of the judgment is questioned on appeal or writ of

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error from the inferior Court where it was rendered. In such cases a strict compliance with the provisions of the statute has been required. But the question here is not whether the judgment rendered in Virginia was regular or might have been reversed, but whether it is a nullity for want of jurisdiction over the person of the defendant. The record shows that a *capias* issued, endorsed "no bail required," and the Sheriff returns that writ "*executed*"—it is also recited in the record that it appeared to the Court that the defendant had been arrested. This state of facts appearing on the record, would the judgment of the Superior Court of Harrison County be treated in Virginia as a nullity? Must not the record be allowed to be at least *prima facie* evidence of the service of the writ upon the defendant? Indeed the recitals of the record itself would seem to be some evidence that the return in this case was regarded in Virginia as a return of personal service.

Were we to assume, however, that the validity of this return was to be tried here by the laws of this State, and not by the laws and usages of the State of Virginia, we are not prepared to say that such a return would render the judgment of a Court of this State void, when called in question by a suit upon that judgment, or in any collateral proceeding. The question in such case would be, had the party personal notice of the suit, or was the writ served upon the person of the defendant; and the question is not upon the sufficiency or insufficiency of the Sheriff's return. A writ of *capias* can only be executed by a compliance with its mandates, and the term "*executed*" can mean nothing more or less than that the officer had complied with the mandates of the writ. It is true, that he ought to show in what manner he has performed this duty, and if his return does not so show how he has executed the writ, it may be quashed, or its insufficiency may be taken advantage of in other modes. But the legality or illegality of the Sheriff's return does not affect the question of jurisdiction. If enough appears from the return to authorize an inference of personal service of the writ, it is a sufficient warrant for the Court to proceed, and when those proceedings terminate in a judgment, and that judgment remains unreversed, it is but right to presume every thing in favor of the jurisdiction of the Court, if the vagueness of the record leaves any thing at all to presumption.

The other Judges concurring, the judgment of the Circuit Court is affirmed.

*Moss and others vs. State, use of, &c.*

MOSS AND OTHERS VS. STATE OF MISSOURI, USE OF JEFFERSON CO.

1. The sheriff, and not the collector, is responsible for the money collected by sale of lands for taxes, under the act of 27th February, 1843.
2. The securities of an officer, appointed for a limited time, are only liable for his official acts during the term for which he was appointed.

APPEAL from Jefferson Circuit Court.

FRISSELL, *for Appellants, insists:*

1st. That the declaration does not disclose any cause of action against the securities in the collector's bond, and the motion in arrest of judgment should have been sustained. *Miller vs. Stewart*, 9 Wheaton 680; *U. States vs. Kirkpatrick*, 9 Wheat. 720; *Arlington vs. Merrick*, 3d Saund. 411; Stat. of 1835, p. 536, §1 and 2.

2d. That the money arising from the sale of land for taxes, under the law of 1843, was chargeable to Moss, as sheriff, and not as collector, and the Court sitting as a jury, therefore, should not have rejected the credit given to Moss, as collector, after his having been charged with the amount of the county part of the money, arising from said sales. Session Acts 1842-3, page 137, §12.

3d. That the amount found to be due by Moss, as collector, by the Court sitting as a jury, is not such an amount as can be deduced from the evidence in the case.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of debt, against Mark Moss and his sureties, on a collector's bond. On the 7th February, 1843, Moss executed a bond as collector for that year. The breaches in the declaration are nearly alike, and substantially aver that Moss, as collector of the county of Jefferson, received on the 21st March, 1844, monies due for the year 1843, which he failed to pay over and account for according to the condition of his bond. It appears that a portion of the monies unaccounted for, was the amount received from the sales of the lands belonging to non-residents, under the act of February 27th, 1843. The plea to the action was *non est factum*. There was a judgment for the plaintiff, the appellee, and after an unsuccessful motion in arrest of judgment, the cause was brought here by appeal.

It is well settled that the plea of *non est factum* only puts in issue the giving of the bond sued on, and admits all the other facts in the case, and under it the plaintiff is not obliged to prove any other averments, or



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*Moss and others vs. State, use of, &c.*

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the breaches contained in his declaration. 7 Wend. 194. When the execution of the bond sued on is not denied, the better practice is to let judgment go by default, as, under our statute relative to the proceedings on penal bonds, this will throw on the plaintiff the burden of proving the truth of the breaches alleged in his declaration.

All the facts in the declaration being admitted, by the state of the pleadings, none of the points arising from the evidence are properly before the Court, but as the judgment will be reversed on another point, and the cause remanded, we will give an opinion as to the liability of the collector, as such, for the money received under the sales of the lands of the *non-residents*. As all the duties which are exacted from the sheriff, under the act for the sale of these lands, are required to be performed as sheriff, we think it clear that, for a neglect of those duties, he is liable as sheriff, and not as collector. So far as the sheriff himself is concerned, both offices being united in him, it is a matter of little importance in what capacity he is chargeable. But as he is required to give two bonds with sureties, one for the performance of his duties as sheriff, and another as collector, and as the sureties for him, in one capacity, may be different from those who are in the other, justice to the sureties requires that he should not be liable on his bond as collector, for breaches of duty committed as sheriff.

Although the act under which the bond, on which this suit was instituted, made the sheriff *ex-officio* collector for two years, yet as he was required to give bond as collector annually, and as his office was vacated unless that was done, and as it is expressly recited in the condition of the bond, that he was collector for the year 1843, we think this case comes within the principle of those limiting the responsibility of sureties, in bonds of officers annually appointed, or appointed for limited periods, which maintain that the responsibility of a surety for an officer, who is annually appointed, cannot be extended beyond the year for which the bond is executed, although the words of the condition be general and indefinite as to time, that such words ought to be construed but for the time for which the office, recited in the condition, is limited to be holden. *Hassell, &c. vs. Long*, 3 M. & S. 363; *Wardens of St. Saviour's Southward vs. Bostick*, 2 New. 175; *Liverpool Water Works vs. Atkinson*, 6 E.; *Lord Arlington vs. Merrick*, 3 Saund. 411.

As it is expressly recited in the condition of the bond that Moss was only collector for the year 1843, and as that year had expired at the time of the breaches alleged in the declaration, whether we regard it as commencing at the date of the bond, or the 1st of January, the declaration on

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*Davis, et al. vs. Imboden.*

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its face showed no cause of action in the plaintiff, and the objection was well taken by motion in arrest of judgment.

If the money had not been collected during the year for which the bond was given, the failure to collect might have been alleged as a breach.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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DAVIS, ET AL. VS. IMBODEN.

In a action upon an assigned bond, the plea of *non est factum* admits the assignment.

APPEAL from the Washington Circuit Court.

FRISSELL, *for Appellants, insists:*

- 1st. That the Court permitted illegal testimony to go to the Court, sitting as a jury.
- 2d. That the Court erred in not granting a new trial.

SCOTT & JOHNSON *for Appellee.*

SCOTT, J., *delivered the opinion of the Court.*

Imboden, assignee, sued Hunter and others upon a bond for the payment of money. The plea was *non est factum*. The defence set up was, that the bond was not assigned by the legal owner of it to Imboden.

The defence was inadmissible, under the plea of *non est factum*; that plea admitted the truth of all the allegations contained in the declaration, except the execution of the instrument sued on. Ragland vs. Ragland, 5 Mo. R. 54.

The other Judges concurring, the judgment of the Court below will be affirmed.

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*Adams, et al. vs. Wilson.*

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## ADAMS, ET AL. VS. WILSON.

1. A recognizance for an appeal from the judgment of a justice of the peace, is void if not entered into in the time and manner prescribed by law.
2. In a recognizance, or bond, given by several, the names of all the obligors, or none, should be recited in the body of the instrument. If the names of part only be recited, it will be obligatory upon them alone, although signed by others.

## ERROR to Platte Circuit Court.

*ALMOND for Plaintiffs.*

The plaintiffs in error contend and insist that the Circuit Court, on the trial, committed error, 1st. In permitting the recognizances to be read in evidence on account of variance between them, and those set out in the declaration; the latter, as described in the declaration, having no blanks therein—and this objection was well taken under the issue made by the seventh plea.

2d. Under the first instruction given by the Court for defendants below, plaintiffs in error, the Circuit Court ought to have found for defendant Cartwright, for the testimony of justice Burns, plaintiffs' own witness, amply and clearly sustains the hypothesis contained in said first instruction—for the said Circuit Court, in requiring said Cartwright to show affirmatively that he was not present at the new agreement between justice Burns, said Thomas Adams, and plaintiff Wilson, evidently committed error; for when plaintiff Wilson entered into a new contract with defendant Adams, after the signing said bond by Cartwright, it certainly devolved on him to show that said Cartwright assented to said new contract, and the testimony of said justice Burns, and said first instruction, were legitimate and relevant under the issue made on the first plea of *non est factum*. *Speak, et al vs. United States*, Feb. term 1815, 9th Cranch's U. S. Reps. 28; *Miller vs. Stewart*, April term 1820, 4 Wash. C. C. U. S. Reps. 26; *S. P. Wooley vs. Constant*, 4 Johns. N. Y. Reps. p. 54; *Oneale vs. Long*, Feb. term, 1807, 4 Cranch's U. S. Reps. 60; *Bates vs. Hinton*, 4 Mo. Reps. p. 78; *Payne vs. Snell*, 4 M. R. 238; *Snowden vs. McDaniel*, 7 M. R. p. 313.

3d. The second instruction ought to have been given for plaintiffs in error, for the law requires the recognizance to be entered into before the justice, and within ten days after the rendition of the judgment—and the law certainly in its spirit never intended securities to be bound in an appeal bond, which did not procure a lawful appeal.

4th. And the third instruction for plaintiffs in error releases Allen, if my position is correct as to Cartwright.

5th. The judgments, offered in evidence, varied materially from those set out in the various counts of the declaration, and ought to have been excluded, under the issue made on the second plea of *nulli record*, as to those very judgments. See *Stapleton vs. Benson*, 8 Mo. Reps. p. 13; *Blakey vs. Sanders*, 9 M. R. p. 742; *Bibbons vs. Nixon*, 4 Wendall p. 207.

6th. For the reasons and authorities given, the plaintiffs' instructions ought to have been refused—and,

7th. The finding and judgment of the Court ought to have been set aside and a new trial granted.

*REES for Defendant.*

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*Adams, et al. vs. Wilson.*

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SCOTT, J., *delivered the opinion of the Court.*

This was an action on three several recognizances, taken on appeals from a justice of the peace to the Circuit Court.

The declaration contained six counts, three counting on the instruments as bonds, and three as recognizances.

The parties went to trial on the pleas of *non est factum, nul tiel record*, as to the judgments appealed from and set out in the plaintiffs' declaration, and *nul tiel record* as to the recognizances of appeal.

The recognizances contained only the name of the appellant, or person appealing, the names of the sureties were omitted in the body of them, they ran thus: "*Know all men by these presents, that we, Thomas Adams and ———, acknowledge ourselves,*" &c. They were signed by the sureties. The justice before whom the causes were tried, testified that the recognizances were originally entered into before him by Adams, the principal, and Willis Cartwright, as surety, on the ninth day after the trial. The plaintiff, the justice, and appellant, agreed that an appeal could not be granted on the recognizance, because Cartwright, the surety, was deemed insufficient. The appellant promised to obtain the signature of Jesse R. Allen, as a surety. The recognizances, in this situation, were left with another justice of the peace to procure the signature of Allen. That was procured, and in two or three days afterwards the recognizances were returned to the justice who tried the cause; he did not know whether they were executed within ten days from the trial or not, but was told that they had been.

From the foregoing statement of facts, the plaintiff, in the Court below, was not entitled to recover. The law requires recognisances to be entered into before the *justice who tries* the cause, and within ten days from the day of trial, or from the refusal to set aside a judgment of nonsuit. If these requisites are not complied with, it will be a good cause for dismissing the appeal. The justice should see that they are conformed to, otherwise he must know the appeal can avail nothing. After the expiration of the ten days, the officer has no right to take a recognizance; his return is *prima facie* evidence of the facts contained in it, and the law will presume that a justice has done his duty when nothing to the contrary appears, but enough is here shown to repel that presumption, and to throw on the plaintiff the *onus* of proving the proceedings to be regular. The justice certifies to a fact of which he knows nothing. These recognizances are not like official bonds and instruments of that character, concerning which it has been held that though the requisites

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*Unterrein, adm'r. vs. McLane.*

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of the law, under which they are taken, be not complied with, yet, being voluntary and not against the policy or provisions of any law, they are obligatory. If a recognizance is not taken within the time required by law, the very purpose for which it is entered into may be defeated. *Harrington vs. Brown*, 7 Pick. 232; *Commonwealth vs. Loveridge*, 11 Mass. 337; 1 Mo. Reps. 403.

There is another objection to these recognizances on which this suit is brought—the names of all the cognizors are not inserted in the bodies of the instruments. The rule of law appears to be well settled that if there are several obligees, all or none ought to be named in the bond, and if a bond is in these words, "We, A. and B., bind ourselves," &c., be also sealed by C., it is not C.'s bond; so a bond in these words, "I, A. B. am bound to C.," although it be signed by D., is not D.'s bond. 1 Tuck. Com. 275. This principle would seem as applicable to recognizances as to bonds.

The other Judges concurring, the judgment of the Court below will be reversed.

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UNTERREIN, ADM'R. VS. McLANE.

1. The failure to enter judgment in the Circuit Court, against the sureties in a recognizance, for an appeal from a justice of the peace, is no bar to a suit on the recognizance.
2. In a suit on such recognizance, no assessment of damages is required, but the judgment is for the penalty—and in some cases for interest thereon.
3. In a *sci. fa.* on such recognizance, if no plea be filed, judgment will be rendered at the first term.
4. The judgment can not exceed the penalty of the recognizance, and interest thereon.

APPEAL from Perry Circuit Court.

HOLDEN *for Appellant.*

FRISSELL *for Appellee.*

SCOTT, J., *delivered the opinion of the Court.*

McLane sued Ignatius Winkler, in a justice's court, and recovered judgment. Ignatius Winkler thereupon took an appeal to the Circuit



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*Unterrein, adm'r. vs. McLane.*

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Court, and entered into a recognizance to McLane, with Jos. Winkler, the intestate of the appellant, in the sum of \$100, conditioned according to the requirements of law. Before the trial of the appeal in the Circuit Court, Jos. Winkler, the surety in the recognizance, died, and a trial being afterwards had, judgment was rendered against Ignatius Winkler, and in March, 1845, a *scire facias* issued against Anthony Unterrein, administrator of Joseph Winkler, the surety; there being no defence, a final judgment, in November following, was rendered on the *sci. fa.* against Unterrein, for the sum of \$114 46, and costs. The judgment was for a recovery of the debt, and not an award of execution. From this judgment Unterrein appealed to this Court, after a motion to set it aside and in arrest.

The first point made for the appellant was, that the remedy on this recognizance was in the Circuit Court on the trial of the appeal, and that the recourse against the representatives of the surety is lost by his death, as the appellee, before the trial, might have required a recognizance with other sureties. This objection was considered and overruled in the case of Cockerill vs. Owens, decided at this term of the Court.

A second point was, that the *sci. fa.* was a suit within the meaning of the practice act, and a final judgment could not be entered at the return term; and that on the substitution of a new party, he was entitled to a continuance. R. C. 825, §19. There was no plea nor defence; a continuance then would have been unnecessary. The law allows a continuance from the return to the next term, but that is only granted when there is a plea or defence. The judgment was for the penalty, and consequently the debt liquidated, so no writ of enquiry was necessary. In the case above referred to, decided at this term, it was shown on what principles relief is afforded by the Courts when a judgment for the penalty is entered, in cases like the present.

The objection that the *sci. fa.* does not allege the non-payment of the judgment, or its continued existence, is not warranted by the record.

The case of Barton vs. Vanzant, 1 M. R. 134, was cited to show that the prayer for judgment in a *sci. fa.*, and not for execution, is matter of substance, and will therefore reverse the judgment. On a re-argument of the case, 1 Mo. R. 136, it was held that if the prayer of a *sci. fa.* be wrong, it is only matter of form, and good on general demurrer. There is no doubt that the prayer of the *sci. fa.* in this case was informal, as well as the final judgment, which was for the recovery of the debt, instead of an award of execution. In *sci. fa.* the prayer is for execution, 2 Saun.

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*Platte Co. vs. Marshall, Greene & Burns.*

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6, and the judgment is that the party *have execution*. But informalities of this kind will not reverse a judgment. 4 Mon. 131.

I have not been enabled to find a case in our reports in which the extent of the liability of a surety, in an action on an instrument securing the performance of covenants by a penalty, was considered. In England it seems to be settled that when the action is for the penalty, there is no recovery beyond it, either against the principal or surety, except in a few special cases. *Hendley vs. Ardley*, 14 Eng. Com. Law R., and the note to case 187. It will be unnecessary to cite the American cases on this subject, they are contradictory, and some of them lay down a rule different from that established in England. A learned judge, after a review of the cases, maintains the following doctrine, which seems consonant to justice: "The obligee cannot, in an action upon a penal bond against a surety, recover any thing more than the penalty of the bond, with interest thereon, from the time when a personal demand was made upon such surety for payment. There is a technical right to recover interest upon a money bond, beyond the penalty, by way of damages for the detention of the debt; if, therefore, the surety should delay the collection of the debt by an unreasonable protracted litigation, it might be proper to direct the jury to find damages to the extent of the interest which had accrued during such unreasonable and improper delay, but, as a general rule, the surety can only be considered as covenanting for the payment of the penalty of the bond, if the condition thereof is not performed by the principal debtor." *Mower vs. Rip*, 6 Paiges' C. Rep. 92. In the case before us the judgment exceeds the penalty of the recognizance by an amount greater than the interest due from the commencement of the suit; there was then no warrant for entering it, and the judgment will be reversed, and the cause remanded, the other Judges concurring.

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PLATTE COUNTY vs. MARSHALL, GREENE & BURNS.

1. It is not necessary to the validity of records of Courts in this State, that they should be signed by the Judge.
2. It is improper to exclude evidence tending to establish a fact material to the issue, although it may not be sufficient of itself to establish such defence.

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*Platte County vs. Marshall, Greene & Burns.*

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**ERROR to Platte Circuit Court.**

**HAYDEN, for Plaintiff in Error, insists :**

1st. That the Court erred in rejecting each, all and every of the proofs which plaintiff proposed to give to the jury upon the trial of the cause.

2nd. That the Court erred in refusing to set aside the non suit, and to grant the plaintiff a new trial upon his motion therefor.

**HICKMAN, for Defendants in Error, insists :**

That the evidence offered by the plaintiff was properly excluded :—

1st. Because there was no record of the proceedings ; the entries on the record book not having been signed by the presiding Justice.

2nd. Because the warrant was admitted by the special plea, and its introduction was, therefore, not necessary.

3rd. The alleged "settlement" did not show that there was any money in the County Treasury applicable to the payment of the warrant. A settlement showing a balance on the 3rd of July, does not prove a balance in the Treasury on the 2nd of July, for the money might have been paid into the Treasury after the presentation of the warrant.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of debt brought against Fred. Marshall and his sureties on his bond as County Treasurer for Platte County. The breach alleged was the non payment of a County warrant, duly presented, when there were monies in the Treasury applicable to its payment. The pleas were *non est factum*, with notice of special matter, *nil debit*, and a special plea, denying that there was any money in the Treasury subject to the payment of the warrant. This plea concluded with a verification. The second plea was ruled out on demurrer, and a special demurrer to the third plea was overruled.

On the trial the plaintiff offered to read in evidence an order of the County Court of Platte County, made on the 2nd July, 1844, allowing J. H. Johnson for his services as Clerk of the County Court the sum of \$78, and directing a warrant on the County Treasurer to issue therefor, which was rejected by the Court on the ground that the record for the day on which said record was made was not signed by the president of the Court.

The plaintiff then offered to read to the jury the warrant issued in pursuance of the above order, and the endorsement thereon made by

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*Platte County vs. Marshall, Greene & Burns.*

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Marshall the Treasurer, when it was presented, stating that there was no money in the Treasury, and bearing date 2nd of July, 1844. This evidence was also excluded on the ground above stated.

The plaintiff then offered to read from the records of the County Court, a settlement made by the Court with Marshall as Treasurer during the same term on the 3rd of July, 1844, showing a balance in the Treasury of \$178 of the fund on which the warrant was drawn, and that for more than a month previous thereto none of that fund had been paid out. This was also ruled out. The plaintiff thereupon took a non suit, and has brought the case here.

In support of the judgment it is contended that the record of the order allowing the account, and directing a warrant to issue therefor, was properly excluded; that the warrant was admitted by the state of the pleadings, and that the settlement made with the Treasurer on the 3rd July, showing at that time \$178 in his hands subject to the warrant, was no evidence that there was money in the Treasury on the day preceding.

With regard to the first point it may be remarked, that our statute does not require the records to be signed by the Judge. It enacts that full entries of the orders and proceedings of all Courts of record of each day shall be read in open Court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed by the Judge at the rise of the Court. We know it is the practice, and it is a commendable one, to sign the records, and we hope it will be persisted in. But even had the signature of the Judge to the record been required, we are not prepared to say that a failure to make it would have rendered the record of no validity, unless it had been so expressly declared. Such a provision would only be considered as directory; obligatory on the officer, and subjecting him to animadversion for neglect to comply with it; but to hold that a failure to execute it would deprive the record of all legal efficacy, would be productive of the most injurious consequences. The entire absence in the certificate of authentication of a record, of all allusion to the fact of its being signed by the Judge of the Court to which it appertains, is some evidence of the professional opinion on this subject. The statute concerning the practice of law in the State of Ohio, expressly directed that the records of the Courts should be signed by the presiding Judge, and yet it was held under it, that the signature of the presiding Judge added no validity to a record, and the record itself would be evidence, or an exemplification might be sent abroad and used without such signature. *Osborn vs. State*, 7 Ohio Rep. In Kentucky, in the case of *The Commonwealth*

*Whitmer vs. Frye.*

vs. B. S. Chambers, (1 J. J. Marshall,) it was said, the business transacted by the Court is stated in the minute book in short notes, and these are written out in the order book or record proper at full length, as the clerk has time. When so written out and signed by the Judge, they constitute the proper records of the Court, and until signed by the Judge they cannot with propriety be considered the record. This was said in a direct proceeding against a clerk for a misdemeanor in office, growing out of an abuse of his records, and not in a controversy between parties whose rights had once been litigated in a Court, and the evidence of which had been spread upon its records. A statute, too, in Kentucky, makes a signature essential to the validity of the minutes of a Court. Swig. Dig. 370.

The state of the pleadings admitted the existence of the warrant, and it was not necessary to go behind it and show the order directing it to be issued.

The evidence of the settlement on the 3rd July was admissible. It might not have been conclusive of itself, but it was a link in the chain of proof, and with very slight circumstances might have established the fact that there was money in the Treasury on the 2nd July. It has been repeatedly decided by this Court, that it is error to reject evidence proper to establish a claim or defence, but not of itself sufficient for that purpose, although at the time no disclosure is made by counsel of an intention to prove the additional facts necessary to establish the claim or defence.

The other Judges concurring, the judgment is reversed, and the cause remanded.

## WHITMER vs. FRYE.

1. Evidence of an erasure or alteration of an instrument of writing, is admissible under the plea of *non est factum*, without affidavit.
2. Where a party, by his own act, renders an instrument such that all legal remedy thereon is lost, he can not, by any other evidence, establish the covenants or promises contained in the instrument. Thus, where an instrument under which A. has received money and become bound to B., is altered by B., he can not recover of A., neither on the instrument nor for money had and received.



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*Whitmer vs. Frye.*

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ERROR to Caldwell Circuit Court.

DUNN, *for Plaintiff, insists:*

1st. The alteration of the instrument sued on, by the plaintiff below, without the consent of the defendant below, renders it null and void. Bla. Com. 2 vol. 308.

2d. The proof of such alteration, offered by the defendant and rejected by the Court, ought to have been received under the issue made by the plea of *non est factum*. Starkie Ev. 2 vol. 480; Chitty Pl. 1 vol. 519.

3d. Such evidence is admissible, notwithstanding the plea is not verified by affidavit. Mo. R. 4 vol. 238; 8 vol. 13.

STRINGFELLOW, *for Defendant, insists:*

1st. The instrument offered in evidence was properly received, its execution not being denied under oath, and the erasure or alteration upon its face will be presumed to have been made before or at the time of its execution.

2d. The proposition to show the alteration made after its execution, was properly rejected—if such evidence were admissible at all, it was only admissible under the plea of *non est factum*, and not to prevent the reading of the instrument in evidence.

3d. Under the plea of *non est factum*, evidence to show an alteration of the instrument, is inadmissible—such evidence is intended to shew that the defendant did not *execute* the instrument sued on, but another and a different one.

4th. Even admitting the Court erred on this question, still the evidence given by plaintiff below of the receipt of the money, is sufficient to sustain the verdict under the count for money had and received.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of debt on a sealed instrument; the declaration contained a count on the instrument and the money counts; pleas, *non est factum* to the count on the instrument, and *nil debet* to the common money counts.

On the trial the plaintiff offered to read the instrument sued on, in evidence; the defendant objected to the instrument going in evidence, because, as he alleged, it had been altered in a material part by the plaintiff without his consent—that the instrument, as originally executed, bore twelve per cent. interest, and that it had been altered so as to bear but ten per cent. The Court overruled the objection: the defendant then offered to prove the death of the subscribing witness, and that the instrument had been altered as above stated. This evidence was rejected and the instrument permitted to be read to the jury.

Talbot, et al. vs. Harding.

There was some evidence of the receipt of money from the plaintiff by the defendant.

The evidence offered under the plea of *non est factum* was clearly admissible—no affidavit was necessary in order to let in the defence of the instrument having been altered by the plaintiff. When an instrument appears on its face to have been altered, the law presumes that the alteration was made before its execution—the defendant clearly had a right to show that it was made subsequently by the plaintiff, without his consent. It is plain that such a defence is allowable under the plea of *non est factum*. 2 Greenleaf 247. There is no question but that the alteration was a material one, and it is *prima facie* fraudulent.

Where a party, by his own act, renders an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the covenant or promise contained in it, by any other evidence. This principle will prevent a resort to the common counts in order to sustain the plaintiff's right of recovery. 1 Greenleaf, 634.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

TALBOT, ET AL. VS. HARDING.

A garnishment is like an attachment—the first service creates the prior lien.

#### APPEAL from Montgomery Circuit Court.

SCOTT, for Appellants, insists:

There being no bill of exceptions in this case, the defendant in error insists that this Court will not review the case, and depends upon the decisions, 7 M. R. 50, 285. But the law, as laid down in these cases, can only apply when the record does not present fully the points decided by the Court below.

In this cause the record presents all the facts which were considered by the Court below, and the points upon which the writ of *mandamus* was refused.

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*Talbot, et al. vs. Harding.*

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**SHELEY, for Appellee, insists :**

1st. Hall having been previously garnisheed by the Fishers, it was nothing but right and justice that they should have a judgment in their favor against Hall, and entitled to a satisfaction of their debt out of the indebtedness of Hall to Brown—indeed, it is the plain letter of the statute. Rev. Code p. 662 §11.

2d. *Mandamus* is not the appropriate remedy; if the justice erred, the Talbots should have appealed.

3d. The fact of the justice signing a notice, which was served upon Hall, does not vitiate the garnishment; the notice is only required as a protection to the garnishee, and no other person can avail himself of it.

4th. A party cannot, in this Court, avail himself of any error of the Circuit Court, unless he excepts to the opinion of the Circuit Court, and that exception is saved. R. C. p. 820, §25; *Con-saul & Barbour vs. Lidell*, 7 M. R. 250.

5th. This Court cannot look into the papers in a cause unless they are incorporated into a bill of exceptions, and made a part of the record. *Pratt vs. Rogers*, 5 M. R. 51. There being no bill of exceptions in this cause, this Court cannot review the proceedings of the Court below, this Court being bound to presume every thing in favor of the Court below. *Crane vs. Taylor*, 7 Mo. R. 285; *Atkinson vs. Lane*, 7 Mo. Reps. 403; see statute before referred to.

**SCOTT, J., delivered the opinion of the Court.**

This was a proceeding by *mandamus*, on the part of the appellants against the appellee, a justice of the peace, to compel him to render a judgment in favor of the appellants, against Henry Hall, a garnishee. It appears from the return of the justice to the conditional writ, that A. & C. Fisher obtained judgment against Johnson Brown, on the 21st Dec., 1844, on which execution issued on the 31st March, 1845, returnable to the 30th May. No property being found, Henry Hall was summoned, as a garnishee, to answer interrogatories touching his indebtedness to the defendant in the execution, Johnson Brown. In September, 1844, the appellants recovered judgment against Brown, on which execution issued on the 31st day of March, 1845, returnable to the 30th day of May. No property being found, Henry Hall was also summoned, at their suit, as garnishee; this garnishment was long subsequent to that of A. & C. Fisher. On the return day of the execution, the agent of the Fishers was unable to attend the justice's Court, from sickness. The appellants attended, and demanded judgment in their favor against Hall; the justice refused to enter it, but continued the cause for the Fishers, to a day when they attended, and then entered judgment for them against Hall. Hall's indebtedness to Brown was not sufficient to satisfy both executions.

From this statement of facts, it is clear that the appellants have no cause of complaint. Their garnishment of Hall was long subsequent to that of the Fishers, and a garnishment being a species of attachment,

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*Gordon's vs. Maupin.*

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Hall being first garnished, at the suit of the Fishers, their right to satisfaction, out of the debt of Hall, was prior to that of the appellants. The maxim applies *qui prior est in tempore, potior est in jure*.

The other Judges concurring, the judgment will be affirmed.

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GORDON'S vs. MAUPIN.

A sheriff is not entitled as against the defendant in an execution to commission, on the amount of an execution, unless the money is collected by him—as in case the money is paid to plaintiff, or the judgment is otherwise satisfied.

APPEAL from Boone Circuit Court.

HAYDEN, for Appellant, insists :

1st. That the sheriff is not entitled, by law, to a commission upon the debt and interest mentioned in the execution, because he did not receive or collect the same, nor pay over the same to the plaintiff; but, on the contrary, the same was *received by the plaintiff himself*, and the same was paid over to the plaintiff.

2d. That the commission allowed by our statute, is the compensation to which the sheriff is entitled for collecting, or receiving and paying money upon execution to the plaintiff, and is not designed or intended as a compensation to him for any other services rendered by him as sheriff, anterior to the collection or receiving the money. Because the statute provides and fixes his fees for such anterior services. See 11th sec. of the act, title "Fees," p. 497-8.

RUSSELL for Appellee.

Upon the point that the sheriff was entitled to his fees for poundage, see Allen on Sheriff, page 353-4-5; see 5th Term Rep. 470; 1 Cain's Rep. 192; 9 Wend. 437; 17 ib. 14; all of which clearly decide that he is entitled to his fees after levy, if there is a compromise, by payment, directly to plaintiff in the writ.

SCOTT, J., delivered the opinion of the Court.

In July, 1846, Maupin, the sheriff of Boone county, had an execution for a considerable amount, against the Messrs. Gordons, at the suit of Price R. Parks. This execution was levied on real estate of the appellants, which was advertised for sale. Prior, however, to the day of sale

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*Gordons' vs. Maupin.*

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the execution, and all costs, except the sheriff's commission on the debt, were satisfied. The sheriff, conceiving himself entitled to the commission allowed by law for collecting monies on execution, refused to return the execution satisfied, and was proceeding to make his commission by sale, when an application was made by the Messrs. Gordons to the Circuit Court, to restrain and to compel the sheriff to return the execution satisfied. The Court overruled the application, and held, that under the circumstances, the sheriff was entitled to his commission. From this opinion an appeal was taken to this Court.

The statute on this subject allows to the sheriff, "for commission for receiving and paying monies on execution, where land or goods have been levied on, advertised, and sold, three and one-half per cent. on the first two hundred dollars, and two per cent. on all sums above that sum, and one half of such commission when the money is paid to the sheriff without a levy, or when the land and goods levied on shall *not be sold*." The 29th section of the same law prescribes that this act, like penal laws, shall be construed strictly. The latter clause of the provision, allowing a sheriff commission when the property levied on shall not be sold, must be construed in reference to the first, which only allows a commission for receiving and paying over monies, and is applicable to those cases only in which, after a levy is made, the money is paid to the sheriff himself, and not to the plaintiff or his agent. The injunction to construe this act as a penal one, would seem decisive of the question. Indeed, independently of any positive provision, it is a principle of the common law that all statutes concerning costs shall be construed strictly. The statute only allows a commission for receiving and paying *over*; the sheriff has done neither the one nor the other; on what principle, then, can he be allowed a commission against the defendants in the execution. In the case of *Jackson vs. Anderson*, 4 Wend. 479, it was held that a sheriff had no right to sell for the purpose of collecting his fees, after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment which will authorize him to interfere with or control any settlement which the parties may think proper to make. His fees are no part of the judgment. They are but an incident to it, and if the judgment itself is satisfied or discharged, he must look to the plaintiff or his attorney for his fees. None of the cases referred to in the New York reports are analagous to this. It is true the statute in that State, like ours, allows a commission for collecting monies, and, under it, it has been held, (*Hildreth vs. Ellice*, 1 Caine's Rep. 192,) that if a sheriff levy on lands, and makes no sale in consequence of a compromise, he will, not-



*Drury & Wiseman vs. White.*

withstanding, be entitled to his poundage. Under the authority of this decision, which is supported by the cases in England, on the construction of the statute of 29th Elizabeth, c. 4, limiting the sheriff's poundage, for the "serving and executing of any extent or execution upon the body, lands, goods or chattels." The statute under which the case of Hildreth vs. Ellice was decided, was similar to this. The recent cases in New York, hold that the substitution of the word "collecting," for that of "serving," has not varied the meaning of the law; 9 Wend. 437, Bolton vs. Lawrence; and that under the statute, which only allows a commission for collecting monies, if a sheriff levies on property and is afterwards prevented from selling it, by arrangement between the parties to the execution, he is, notwithstanding, entitled to his poundage. But it will be found upon an examination, that all the cases reported in the New York books were against the plaintiff in the execution, and nothing is said in any of them from which it can be inferred that the defendant, in the execution, would be liable for the fees. The execution is sued out by the plaintiff; the services of the sheriff rendered at his instance, and if afterwards, by his means, the right of taking from the defendant the remuneration allowed by law is destroyed, on what principle is the defendant liable to the sheriff.

The question whether the plaintiff in the execution would be liable to the sheriff for his commission, is not now before us, nor is it intended to give any opinion respecting it.

DRURY & WISEMAN vs. WHITE.

1. A verdict will not be set aside because of the failure of the Court to instruct the jury, when no instructions were asked.
2. If instructions are asked which have no relation to the issue, they should not be given, although they may contain correct abstract principles.

APPEAL from Montgomery Circuit Court.

CAMPBELL & FORSHEY, for Appellants, insist:

- 1st. Drury and Wiseman as Post Masters are only bound for ordinary care and diligence, and

*Drury & Wiseman vs. White.*

are not bound for the same degree of care that is required of common carriers. They as Post Masters are not insurers of property as common carriers are. Story on Bailment, sections 461—2—3.

2d. Benjamin White, by his agent Joseph C. White, was guilty of a gross fraud in putting a five-fold letter in the Post Office, with two hundred dollars, carefully folded and pressed to give it the appearance of a single letter, and concealing the fact that it contained money, in order that it might be carried as a single letter, and thus enable him to cheat the Government and the Post Masters, and mislead and deceive them as to the degree of care and diligence that ought to be used by them, and on this account alone he cannot recover. Story on Bailments, sections 14—15—77—78—79—186—565; Jones on Bailments, 38—39. 2 Kent, 603—4.

3rd. White the plaintiff, and his agent, were guilty of negligence in this, that the letters, numbers, dates and description of the four bank notes pretended to have been sent were not preserved, so as to enable the Post Masters to trace them up; notice of the loss was not communicated to Drury and Wiseman in due time,—no information was given to Drury in relation to the description of said notes when asked for by him, and no efforts were made by White to trace out the money alleged to have been mailed.

4th. There is no evidence whatever against Wiseman, one of the defendants, and for that reason alone the joint verdict should have been set aside, and the joint judgment is erroneous.

5th. When many months have transpired, Post Masters cannot be expected to remember, much less to prove to whom they have delivered the multitude of single letters that have come to their hands, and even full proof that such a letter has come to an office is not sufficient to compel them to prove what has become of it, nor to make him liable for the money secreted therein.

6th. The liability of a Post Master must be determined after a proper consideration of the nature of his office and duties, the usages of the country, the public convenience, and the utter impossibility of such officer accounting specially for every single letter that he receives and hands out.

7th. The fact that the letter in controversy was marked as a single letter on its back, on the way bill, on the books of the Post Master at Poolsville, and on his returns to the General Post Office, are sufficient to raise the presumption that it actually was a single letter, and Drury and Wiseman were bound to presume that the Post Master had performed his duty, and that it was marked truly and not falsely.

8th. The Circuit Court erred in refusing to give to the jury the instructions asked for by the defendants, and the refusal to give them in the presence of the jury was calculated to deceive the jurors.

9th. If the instructions given contain correct legal propositions, and there is testimony in the record, to which such instructions will properly apply, it is not necessary to use any form of words to state specifically that the instructions refer to the case on trial.

10th. If the instructions were objectionable merely on account of their form or phraseology, it was the duty of the Circuit Court to have suggested a modification thereof, or to have given instructions to the jury in proper form in lieu of those refused.

11th. Drury and Wiseman as Post Masters, acting under oath, and having fair characters, must be presumed to have done their duty properly, and fraud and gross misconduct cannot be fairly presumed against them, from the mere fact that a single letter has arrived at their office, and that when applied to several months afterwards they cannot recollect to whom it was delivered.

*CAVE, for Appellee, insists:*

1st. There is no error in the Court's refusing to give the instructions prayed for by the defendants, because the whole of said instructions are mere abstract propositions calculated to inveigle and mislead a jury, and are based upon no particular evidence given in said cause, and not one of

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them hypothetical. See 3rd vol. Mo. Reps. 411—382; 1st vol. 318; 8th vol. 224—228; 6th vol. page 6. The defendants are not prejudiced by the Court's refusing to give said instructions. See 1st vol. Mo. Reps. 505; do. 318. See 2nd Marshall on hypothetical instructions, 197.

2nd. The Court did not err in refusing to set aside verdict and judgment and grant a new trial, because the weight of evidence strongly preponderates in favor of the verdict. See the evidence on this point, and this Court will not disturb a verdict for a slight preponderance of evidence against it. See 1st vol. Mo. Reps. page 14; 5th vol. Mo. Reps. 489—529. 2nd Marshall, 42; do. 114, and 7th vol. Mo. Reps. 579. And these authorities we confidently say will be conclusive, and that this Court will affirm the judgment of the Court below.

NAPTON, J., *delivered the opinion of the Court.*

This was an action on the case brought by Benjamin White against Charles J. Drury, Post Master, and Joseph P. Wiseman, his deputy, to recover two hundred dollars, alleged to have been sent by mail to the plaintiff, and to have been lost through the carelessness and negligence of defendants. The third count of the declaration was in trover. The plea was not guilty. A trial was had in the Circuit Court of Montgomery County, and the verdict was for the plaintiff; a motion to set the verdict aside was overruled, and an appeal was taken to this Court.

It appeared from the testimony given on the plaintiff's behalf, that Joseph C. White, of Maryland, wrote a letter to the plaintiff enclosing therein four fifty dollar bills on the Bank of Baltimore, and directing it to Danville, Montgomery County, Missouri, deposited it in the hands of Edmund Fallen, the sub-deputy Post Master at Poolsville, Montgomery County, Maryland. This was on Saturday, the 20th day of January, 1844, and was done in presence of a witness, who saw the said deputy Post Master envelope the letter and direct it to Danville, &c., observing that it would go sooner when directed in that way than when sent through a distributing office. It appears, also, from the mail books of the office at Poolsville, that a letter was mailed at that office on the 20th January, 1844, directed to Danville, Montgomery County, Mo., and also another on the 23d January, 1844, directed to the same office in Missouri. These letters were each charged with single postage, and marked 25 cents on the outside. A way bill was produced on the trial, supposed to be the one accompanying the letter of the 20th January, 1844, which it seems from the testimony of *Saunders*, a traveling post office sub-agent, was procured from Brown his principal, and by Brown procured from the defendant at Washington. The clerk who attended to this branch of business in the post office department, stated that he found a post bill purporting to be from Poolsville to Danville, dated 20th January, 1844, and calling for an unpaid letter, (25 cents,) but could find no post bill

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for the letter sent on the 23rd of same month and year. The Auditor of the Treasury for the post office department stated that his books showed the returns from Poolsville from January to March, 1844, and among them two unpaid letters directed to Danville, one sent on the 20th January, and the other on the 23rd, but the returns from Danville showed the receipt of only one letter on the 8th February from Poolsville, dated 20th January, 1844, and marked unpaid, (25 cents.)

It appears that the post office agent called upon Drury and Wiseman in the summer of 1844, and examined the transcript of mails received at Danville during the months of January and February. He found an entry made February 9th, of a letter received from the office of Poolsville, dated 20th January. This entry was, as Drury informed the agent, in the hand-writing of Wiseman. No entry was found of any receipt of the letter of the 23rd January. By enquiries it appeared that the letter written on the 23rd, and which was addressed to Mrs. Gott, had arrived, and was obtained from the person to whom it was directed.

A letter was read upon the trial from Drury to Joseph C. White, dated July 23rd, 1844, enquiring of said White as to the numbers, dates, &c., of the bank notes he had transmitted to the plaintiff. In this letter the writer acknowledged the great probability that the letter had reached his office, and desired the numbers of the notes that he might trace them up if practicable.

Evidence was given to show that the office at Danville was carelessly conducted, and was kept in such a situation in the store room of said defendants that letters might be abstracted from the case or box in which they were kept without detection. Evidence was also given to show by the acknowledgements of one of the defendants, that neither the plaintiff nor any of his children or servants had gotten the letter directed to him from Poolsville and containing the notes aforesaid.

The defendants asked the following instructions:—

1st. The jury are not bound to credit the testimony of witnesses whose character for truth has not been assailed by other witnesses, but must give to every witness the credit to which *in their judgment* he is entitled under the circumstances.

2nd. The jury have the right to give just such credit to the testimony of a witness as they may think proper.

3rd. Although a witness is not incompetent to testify, yet his relation to the parties or to the subject matter of the suit may be considered by the jury as affecting his credibility, and they may give him just such credit as they may think proper.

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4th. That it is *prima facie* evidence that a letter is single which has been charged single postage by the Post Master mailing it, and must be so received until it is proved to the contrary by sufficient credible testimony.

5th. A witness can only prove his own hand-writing, if it has been out of his possession in the same manner that others acquainted with it can do, to the best of his knowledge and belief.

The Court refused to give these instructions, and the defendants excepted.

Only two questions seem to arise upon the record in this cause; the first being whether this Court will set aside the verdict upon the ground that it is not sustained by the evidence, and the second growing out of the instructions.

The last point can scarcely admit of argument. The instructions, however correct they may be in the abstract, appear to have no bearing upon any controverted or controvertible point in the case, and could therefore only have mislead the jury had they been given. The questions at law, which were really involved in the case, remained without any exposition on the part of the Court.

Under the circumstances, this Court would not be authorized to set aside the verdict. The case was submitted to a jury without instructions. None were asked which could throw any light upon any legal question which the testimony raised. The evidence seemed to establish beyond controversy that a letter was written by Joseph C. White to his brother in Missouri, enclosing \$200 in Bank of Baltimore notes, and that this letter reached the post office at Danville; there was proof to show that the plaintiff did not receive this letter. The question of negligence was then left to the jury without any instructions on this point being asked by either party. It is too late now to say that the jury were not properly instructed in the law. It will not answer for a party to lie by and await the chances of a favorable verdict, and when the chance has proved against him, to turn round and complain of the failure of the Court to give a correct exposition of the law to the jury. When such a course is taken, we must infer that the party preferred leaving the law and fact to the decision of the jury. There are plain cases, it is true, in which this Court has interfered, but we do not regard this as one of them.

The other Judges concurring, the judgment is affirmed.

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*Hyde vs. Curling & Robertson.*

### HYDE vs. CURLING & ROBERTSON.

A Court has power to order entries of proceedings, had by the Court at a previous term, to be made *nunc pro tunc*. But where the Court has omitted to make an order which it might, or ought to have made, it can not, at a subsequent term, be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.

### ERROR to Marion Circuit Court.

#### RICHMOND, for Plaintiff in Error, insists:

1st. It was erroneous in the Circuit Court to order an enquiry of damages, without first entering a judgment by default against the garnishee, and such a judgment, *nunc pro tunc*, after the assessment, was irregular and void. Rev. S. 476, 140, 814-15; 17 Johns. Rep. 270; Graham's Practice 633-4; 5th Wend. 106; 6th Cowen 599, 600; 1st Monroe 113; 1 Durn. & East. 637-8; Bates vs. Lockwood, Tidd's Practice 965-6-7.

2d. The Court erred in ordering an enquiry of damages on the same day that the *supposed* judgment, by default, was entered up. Evans vs. Bowlin, 9 Mo. R. 407.

3d. It was error in the Court to assess the damages without a jury, as there was no written evidence of indebtedness. Pratte, &c. vs. Coil, 9 Mo. R. 163.

4th. The Court, sitting as a jury, found a verdict *palpably* contrary to the law and evidence in the cause.

5th. The affidavit of plaintiff, and other facts, show that injustice was done to the defendant in the Circuit Court, and a new trial should, therefore, have been granted. Mahan vs. Jane, 2 Bibb 33; do. 287; Haggin vs. Christian, 1st Marshall 579; Dicken vs. Smith, 1st Little 211.

#### GLOVER & CAMPBELL, for Defendant in Error.

Insist on the affirmance of the judgment:—

1st. Because a good and sufficient judgment, by default, was entered by the Court on the 10th August, 1846, immediately before the Court proceeded, by consent of the defendant's attorney, to assess the plaintiffs' damages. The plaintiffs were entitled to judgment by default, at the first term after the filing of the interrogatories served on the defendant. See Rev. C. 1835, p. 79, §22; Graham's S. C. Practice 632. That the plaintiffs did not take their judgment as early as they might, cannot be objected to by the defendant. 6th Mo. R. 322; 7 ib. 4; 7 ib. 569; 1 Mon. R. 55. Or if it was ground of objection he waived it by appearing and consenting to proceed with the trial. 2 M. R. 25; 5 ib. 61. The case of Evans vs. Bowlin, 9 M. R. 410, is not in point here, because the attorney consented to proceed with the case, and dispensed with a jury. That the attorney had the power to bind his client. See 6 John. 300; 1 Bin. 214; 7 Pick. 137; 1 Greenleaf's Ev. 255; 3 Taunton Rep. 485; 1 Salk. 86; ib. 88. But it will also be perceived that no objection was made to entering up the judgment by default, on the 10th August, 1846, nor any attempt to set it aside after it was entered up. See 1st Mo. Rep. 156.

2d. That Wesley W. Hyde was largely indebted to the plaintiffs; that he made arrangements to pay his home debts only; that he put in the hands of his brothers \$5000 or \$6000; that he

*Hyde vs. Curling & Robertson.*

sued the defendant Jordan for over \$7000, and dismissed his suit only when he found the plaintiffs were about to recover; that he had received several thousands of dollars from his parents, and settled the same on his child; that he had no visible property, but plenty of money, connected with the fact of total silence, on the part of the defendant, as to the matters of account between Jordan and Wesley, are circumstances fully justifying the verdict. As to the alleged newly discovered evidence, the affidavit was wholly insufficient. 2 New York Dig. p. 145, title "New trial;" 3 Caines R. 182; 2 ib. 185; 18th Johns. 489; 7 Mass. 205; 15 ib. 378; 2 Binney 582; 4 John. 425; see also Graham's Practice 511; 7 Mo. Rep. 25. The evidence which the defendant pretends to have discovered, was, at best, but *cumulative*, and was, therefore, not admissible. It was not competent for the defendant to introduce evidence on the execution of the writ of enquiry. 9 vol. 503.

3d. It would seem to be quite immaterial whether the orders, which the Court made *nunc pro tunc*, were properly taken or not; yet the plaintiffs insist said entries were regular. In 1 Salk 401, the case was a verdict for plaintiff, and the death of defendant before judgment. The Court held that as plaintiff was entitled to his judgment, prior to his death, he should have it. See 2 Tidd's Practice 965; 1 Salk 87; 3 Salk 116. Now certainly in this case the plaintiff was entitled to judgment by default, upon the failure of defendant to appear. If so, the entry might properly be made at a subsequent term, because the plaintiffs' interrogatories filed, the law, and the failure of defendant to appear, render it as positively certain that plaintiffs were entitled to their judgment, as if a verdict had been returned into Court. But, in addition to this, the record shows that the orders were really made by the Court, and that defendant had moved to *set aside the default*. 9th Mo. Rep. 410.

*McBRIDE, J., delivered the opinion of the Court.*

On the 25th June, 1844, an execution issued from the clerk's office of the Marion Circuit Court, in favor of Curling and others, and against Wesley W. Hyde, for the sum of \$4,396 35, and costs of suit. On this execution, Jordan W. Hyde, appellant, and others, were garnisheed. Interrogatories were filed against the garnishees, on the 16th October, 1844, which were served on them on the 14th Nov., 1844. On the 10th August, 1846, the case being called, Jordan W. Hyde offered to file his answer to the interrogatories exhibited against him, but the Court refused him leave to answer. The Court then, "by consent of parties," proceeded to hear the evidence and assess the damages, and gave a verdict against Jordan W. Hyde for the sum of \$5,021 51, and directed judgment to be entered up for the same. On the next day, 11th Aug., the Court, on the motion of the plaintiffs' attorney, ordered a motion to be entered up as of the 13th day of the previous term, and as if made by Jordan W. Hyde, asking the Court to set aside a judgment by default entered against him on that day, and for leave to file his answer to the plaintiffs' interrogatories, which motion was overruled. On the 12th day of August, 1846, the defendant, Jordan W. Hyde, filed his motion to set aside the assessment of damages and for a new trial. On the same day the plaintiff filed his mo-

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tion to have a judgment by default entered against the defendant, as of the 13th day of the last term, which was sustained, and a judgment, by default, *nunc pro tunc*, was thereupon entered. On the 13th August, 1846, the defendant moved in arrest of judgment, which motion the Court overruled—the Court also overruled his motion for a new trial. Exceptions were taken to the several decisions of the Circuit Court, and the cause is brought here by writ of error.

The first error assigned, is the assessment of damages by the Court, before a judgment by default had been taken against the garnishee.

This proceeding is founded upon the sixth section of an act to regulate executions, Rev. C. 1845, 476, which provides that “when a *fiery facias* shall be issued, and placed in the hands of an officer for collection, if no sufficient property can be found in the county, whereof to levy the amount due on said writ, it shall be the duty of the officer to summon, in writing, as garnishees, all such debtors of the defendant, as the plaintiff, his agent or attorney, shall direct, to appear in Court on the return day of the *fiery facias*, to answer, on oath, such interrogatories as may be exhibited against him, on the part of the plaintiff, touching his indebtedness to the defendant in the execution; and the like proceedings shall be had; and the like judgment rendered, for or against the garnishee, as are and may be provided in cases of garnishees, summoned in suits originating by attachment.”

The act above referred to, is an act to provide for the recovery of debts by attachment, R. C. 132, the twenty-seventh section of which provides for the filing, by the plaintiff, of written allegations and interrogatories against the garnishee, and requires an answer thereto under oath. The twenty-eighth section requires them to be filed within the three first days of the term, if the term shall so long continue, or during the term, and not thereafter, unless for good cause shown. The twenty-ninth section directs the answer of the garnishee to be filed at the same term, unless for good cause shown, &c., and in default, the plaintiff may take his judgment by default against the garnishee, or may, by attachment of his body, compel him to answer. The thirtieth section provides that the judgment, by default, may be proceeded on to final judgment, in like manner as in case of defendants in actions upon contracts.

We are referred in the foregoing section, for the manner of consummating judgments by default, to the general provisions on the subject, which are to be found in the act to regulate practice at law. R. C. 814-15. By the thirty-sixth section of this act, it is provided that if the defendant shall fail to file his plea or other pleadings within the time prescribed by

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law, or the rules of practice of the Court, an interlocutory judgment shall be given against him by default. By the forty-first section, where the suit is founded upon any instrument of writing, and the demand is ascertained thereby, the Court shall assess the damages, and final judgment shall be given thereon. The forty-second section provides that "in all other cases of such interlocutory judgment, the damages shall be assessed by a jury, empanelled in the Court for that purpose, and every such enquiry of damages shall be made at the term next after the term in which such interlocutory judgment shall be rendered unless the Court direct it to be made at the same term."

The record shews that Jordan W. Hyde was garnisheed in time for the October term, 1844, and that at that term of the Court interrogatories were filed against him, which he failed to answer; *then* the plaintiff might have taken his judgment by default against him, and an order for an enquiry to assess the damages, returnable to the next term of the Court; but he failed to do so. A period then of near two years elapsed, before any further action is had in the case, when the record presents the Court in the act of assessing the damages, "by consent," whilst Jordan W. Hyde is, in every manner and form, importuning the Court to permit him to answer to the interrogatories, and disclaiming all and every species of indebtedness to the defendant in the execution. From this it would appear that the plaintiff had been very remiss in the prosecution of his action; and that whilst the defendant may have no special claim to the indulgence of the Court, yet the delay which had taken place should have induced the Court to commence and try the case *de novo*.

The Court proceeded to hear parol evidence, there being no written evidence of indebtedness, and assessed the damages against the defendant, Jordan W. Hyde, to the amount of the debt in the execution, to-wit: \$5,021 51, and entered final judgment against him. This assessment was perhaps right and legal, if the defendant was present and consented thereto, although the statute appears not to have contemplated the consent of a party who makes default. Consent, however, may be considered as a waiver of an irregularity. But was the final judgment legal, entered as it was before a judgment by default had been taken? To remedy this irregularity, the record shows that on the next day after the assessment of damages, and the rendition of the final judgment, on the motion of the plaintiff, a judgment by default was entered, *nunc pro tunc*, as of the 13th day of the previous term.

No question can exist as to the power of the Court to make *nunc pro tunc* entries, for the furtherance of justice, and thus to place on the re-

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cords the action of the Court, had on a former day of the term, or at a previous term, and which the clerk had omitted to enter at the time. This power should, however, be exercised with great caution and circumspection, otherwise it may become the means of great wrong and oppression. But where the Court omit to do that which, by the rules of law and the practice of the Court, it may legally do, it cannot supply such omission at a subsequent term, by making an entry *nunc pro tunc*. And whenever it becomes necessary to make such an entry, the record should show the facts upon which the power is exercised.

In this case, there is an absence of any evidence conducing to show that the judgment by default had actually been ordered, when the plaintiff was by law entitled to it, and that the subsequent order or judgment was made to supply the omission of the clerk, and not that of the Court.

This record exhibits a case of great confusion and inattention—it appears as if it had escaped the attention of the Court and the parties for a period of time sufficient almost to operate a discontinuance; when, therefore, it was resuscitated by the plaintiff, the Court should have put the parties in a condition to assert their rights, without any impediment growing out of the delay which had taken place.

We are not advised, by the record, what reason the defendant assigned for asking the Court to set aside the judgment by default, on his first motion. But it appears to us that the Circuit Court should not be very strict in its requisition, when it is recollected that this is a summary proceeding, for a large sum of money, and if the judgment should be wrong, it would prove ruinous to the defendant.

Wherefore, without investigating the question whether this is not a joint proceeding against the defendant and others, garnisheed at the same time, and the judgment against him irregular, without the record showing what disposition was made of the other defendants, we are of opinion that the judgment rendered in the case is irregular, for the reasons assigned, and that the Court should have permitted the defendant to file an answer, under the circumstances of this case, and that its judgment must be reversed, and the cause remanded.

SCOTT, J., not sitting.

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*Overbeck & Shaw vs. Galloway.*

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OVERBECK & SHAW vs. GALLOWAY.

1. No appeal will lie from the order of a County Court establishing or changing a road, unless some private right be affected by such order.
2. No person can become a party to such proceeding so as to be entitled to an appeal, unless he have some private right affected by such proceeding.

ERROR to Platte Circuit Court.

*ALMOND, for Plaintiffs, insists:*

Galloway's motion was properly overruled by the County Court for reasons —

1st. The opposite party, Overbeck & Shaw, had no notice of it. See *Caldwell vs. Lockridge*, 9th vol. Mo. Reps. p. 362.

2nd. Even if notice had been given, the County Court ought to have overruled said motion, because Galloway for himself and the other objectors as is shown by the record, was in Court when the new route was established, and took no exception. So far, then, as Galloway and the objectors were and are concerned, the establishment of the new and the vacation of the old route, was not an *ex parte* proceeding.

3rd. The bill of exceptions does not show that any testimony was introduced on or at the hearing of said motion, but only attempts to set out *what* the new route was established upon, on preceding days, and does not even state that that was *all the evidence*.

4th. Galloway then did not and has not preserved *his case* in his bill of exceptions.

5th. And I hold that where a County road has been established, though irregularly, upon the records of the County Court, although the viewers or any one else concerned with it may not have complied with the law in establishing it, still it is not competent for the County Court summarily on motion and with or without notice to any one to rescind their orders, and thereby vacate roads. See Revised Statutes, State edition, page 694, §20 and §23. But, 2ndly—*The case* dismissed by the Circuit Court was *evidently* and *clearly* the motion of Galloway. And why render a judgment for costs against Overbeck and Shaw, or either of them? Galloway was evidently the plaintiff on his motion in the County Court as well as in the Circuit Court—and although the County Court may have done wrong in establishing the new and vacating the old route, still if Galloway started a proceeding which ought to have been, and was dismissed, he, Galloway, ought to have been adjudged to pay the costs of it. See *Franciscus vs. Martin*, 9th M. R. 197.

*WILSON & REES, for Defendant, insist:*

1st. There is no petition in *writing* to the County Court as required by the 20th section of the Statute under the head of roads and highways.

2nd. The commissioners took no oath as required by the 21st section, the words "faithfully and impartially" being omitted in their oath, which are of the very essence of the oath required.

3rd. The new road is not equally convenient to travelers as required by the 22nd section.

4th. No notice of application was given as required by the 22nd section.

5th. There were no commissioners appointed on remonstrance.

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*Overbeck & Shaw vs. Galloway.*

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McBRIDE, J., *delivered the opinion of the Court.*

Overbeck and others on the 6th April, 1846, presented their petition to the County Court of Platte County, praying for a change in the County road leading from Weston to St. Joseph, which was granted, and the change made, and the old road vacated. At the instance of Galloway the order was opened and the case adjourned over until the next Thursday, (9th April,) when, after hearing the evidence adduced by the objectors, the Court proceeded to make the change asked for by the petitioners. On the 10th April, 1846, Galloway filed his motion to set aside the orders made by the Court, on the petition of Overbeck and others, which being overruled, he excepted, and filed his bill of exceptions, together with an affidavit for an appeal, which was granted.

When the cause reached the Circuit Court, that Court on an inspection of the record and bill of exceptions, reversed the order of the County Court granting the change of the road, and then dismissed the proceedings. Thereupon, Overbeck moved in arrest of judgment and for a new trial, which having been overruled by the Circuit Court, he excepted, and has brought the case here by writ of error.

The first and principal question arising in this cause involves the right of the defendant in error to maintain this proceeding. We have examined the statute regulating roads and highways, and can find no provision authorizing the objectors, sustaining the relation to the subject which Galloway does, to become a party to a proceeding in the County Court for a change in a road, and when the decision of that Court is against his wishes, to take the case by appeal to the Circuit Court, and ask the Circuit Court to set aside the order of the County Court.

The record no where shows that Galloway has any other or different interest in the road from that of the public at large, and if he thus situated has a right to become a party to the proceedings, and when the decision is against him, the right of appeal to the Circuit Court to correct the error of the County Court, then every individual in the community has an equal right. This would not only be ruinous, but violative of those general principles, that a common interest which belongs equally to all, and in which the parties suing have no special or peculiar property, will not maintain a suit.

In the case of Cole, &c. vs. Shannon, 1 J. J. Marsh, 218, the question we are now investigating was discussed by the Court of Appeals in Kentucky, and upon a re-hearing decided by that Court. The case is one very analogous to the one now before us, and that Court held, that no

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*Overbeck & Shaw vs. Galloway.*

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one not directly interested in the land through which the proposed road is to pass, can become a party and entitle himself to a writ of error. Even where a road passes through an individual's land, and a proposition is made to remove it therefrom, the owner of the land although objecting, cannot become a party to the proceeding, for the Court remark that "the interest which the owner of the land has in a public highway passing through it, is of no other kind than that which every citizen may claim. The road is established for the public convenience; one man has as much right to use it as another, and the rights of all are precisely the same; and therefore, although one may use it more than another, or may be more benefited by its use, the interest of all is the same in *quality*. If one can prosecute a writ of error, therefore, another has an equal right to do it. Owning the land through which a public road passes gives to the owner no exclusive or peculiar right to the road.

"The road may be very advantageous to him and furnish facilities which may greatly enhance the value of his land; so may the contiguity or proximity of a highway, or bridge, or ferry, to the land of an individual, increase the value of the land, and therefore its discontinuance may subject him to inconvenience and loss. His interest in the road, or bridge, or ferry, would be greater in quantity than that of an individual who owned no land; so one who makes frequent use of a privilege granted to the public may be considered as possessing a greater degree of interest than another, who although he has an equal right, does not make the same or any use of his privilege.

"In all of these cases, the interest of all the persons who have been designated, would be the same in kind although very different in degree, any one or none of them, therefore, can complain to this Court. It is admitted that one who owns no land through which the road runs cannot complain, hence Cole and O'Hara cannot appeal in this case, the road did not belong to them, they had no *franchise* in it, they had no other right to it than that which was common to all others."

The same principle is asserted and maintained in 1 Bibb, 292, and 3 Bibb, 78. In the latter case, it is said that an interest to entitle a person to become a party to a proceeding of this character must be a direct interest in the thing or subject which is the matter of controversy, for it is a rule that no one can maintain a writ of error who would not be entitled to the thing in contest if the judgment were reversed. Now it is plain that the objector in this case, if the road were established, could have no other right in it, or to the use of it, than any other citizen of the community.

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*Overbeck & Shaw vs. Galloway.*

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If, then, Galloway is not the owner of the land through which the proposed change of the road runs, and is not the owner of the land through which the old route passed, we cannot conceive any interest special to him which would entitle him to sue out a writ of error, or appeal from the order of the County Court making the change. It is not sufficient to say that the public interest and convenience has been or will be prejudiced thereby, for many cases of such prejudice might exist, and it would be obvious that no individual right of action would accrue. As if an obstruction was put in a public road whereby individuals would be put to great trouble and inconvenience in passing along the road, yet if no private damage was sustained no right of action would exist on the part of individuals.

In the establishment of new roads, or the changing of roads already established, or the vacation of existing roads, wherever it is probable that individual or private rights will be affected, the statute provides for the making of such individuals parties by summoning them to appear and show cause if any they have or can, why the prayer of the petitioners should not be granted. But where, as in this case, a change in the road is desired for cultivation, and the change is upon the land of the petitioner, and the objection to the change is based upon the supposed injury to the public convenience, the statute does not prescribe any method by which that interest may be protected against the unwise or injudicious action of the County Court.

The only remedy for an injury to the public interest arising from the injudicious acts of the County Court in establishing, changing or vacating of public roads, where no private rights are infringed or compromised, is by petition to the Court for their further action remedying the evil complained of, unless their act be of such a flagrant character as to authorize a proceeding, criminally, against them.

This Court in the case of *Matson vs. Dickerson*, 3 Mo. Reps. p. 339, express the opinion that a writ of error will not lie from the Circuit to the County Court. Wherefore, for the foregoing reasons, the Circuit Court should have dismissed the writ of error sued out by Galloway, but as that Court so far sustained the writ of error as to reverse the order of the County Court made in the premises, the judgment of the Circuit Court is reversed, and the order of the County Court is affirmed.

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*Leakey, adm'r, &c. vs. Maupin.*

LEAKEY, ADM'R, &C. VS. MAUPIN.

1. A husband is not entitled under our statutes to the *choses in action* of his wife, not reduced into possession during her life. As where the wife being entitled to a distributive share of her father's estate, died before the same was received by the husband—he is not entitled to such share, but the same will go to her heirs.
2. Although the husband is entitled to administer upon his wife's estate, and as such administrator to sue for and recover her *choses in action* which had not been reduced into possession by the husband during the life of the wife, yet he will hold them to be distributed to his wife's heirs.

APPEAL from Howard Circuit Court.

CLARK, for Appellant, insists:

1st. By the common law the personal estate of all intestates vested in the administrator without any charge of distribution, which remained until the enactment of the statute of 22 and 23 of Car. 2nd, after that statute all estates were charged with distribution except estates acquired by the husband as administrator of his wife, which were expressly exempted. Hence by the common law, as well as under the statute of Car. 2nd, the husband is entitled to administer, and not being required to distribute, obtains and takes his wife's estate as her administrator; but our statute of descents and distributions requires that all estates, without any exception, administered upon, shall descend and be distributed according to the provisions of that act. Admitting then that the personal estate of the wife at her death becomes the husband's, as her administrator he holds the same as any other administrator charged with distribution under our statute, the provisions of which exclude him where there are any kindred;—the principles involved in this case were decided by this Court in the case of Pratt vs. Wright, administrator, reported in the 5th vol. Mo. Reps. 192. In aid of the views here taken, we also refer to 2nd Williams, Ex'r, 479—1061.

2nd. It is also insisted that in this country all estates (including *Femme Coverts*,) at the death of the intestate vests in their administrator for the use and benefit of those entitled to distribution, and the same must be distributed to the next of kin as pointed out in the statute; then in this case, at the death of the ancestor Leakey, his estate vested in his administrator charged with distribution to the next of kin including the appellee's wife, but she having died intestate without leaving issue, before her interest was distributed the same in the hands of her father's administrator would under our statute as well as by the rules of equity be distributed to her kindred, her husband having no right in such an interest until reduced to possession, whether as a chose in action or an interest acquired otherwise. See our statute of descents and distributions, page 421, Digest.

3rd. In England, as well as in this State, the administration is always granted to the one having the interest in the estate: in this case, at the death of Mrs. Maupin, her husband not being entitled to a distributive share in her estate not reduced to possession, would not be entitled under our statute to administration in preference to her kindred, but if he was, he must distribute the estate according to our statute, and if so he is excluded; he takes here if at all under our statute, while in England, and many of the States of this Union, he takes under the common law and the act of Car. 2nd. See act of distribution, Digest, 421. 1st Williams on Ex'r, 267—268—269—270. 5th Mo. Reps. 192.



*Leakey, adm'r, &c. vs. Maupin.*

DAVIS, *for Appellee, insists :*

1st. Upon the death of Jeremiah Leakey, his personal as well as real estate *descended* and did not go to the ordinary or legal representatives as at common law. See the case of Wright vs. Pratte, 5 Mo. Reps. 192; also the statute of descents and distributions of 1835, page —. The right of inheritance in the personality of the deceased did not remain in abeyance; but vested in his heirs *immediately* upon his death, subject to the rights of creditors and expense of administration, as enjoined by other laws upon the administration.

2nd. The right of inheritance did not vest in Sarah Maupin, the daughter of Jeremiah Leakey, on the death of her father, but in her husband, Rice G. Maupin; she, being at that time a married woman, cannot take. See Toller on Executors, 225. 4 Dana's Rep. 333.

3rd. Rice G. Maupin's interest in said inheritance is not derived through the statute of descents and distributions of this State, but depends upon principles of the common law by virtue of his marriage. See 6 Johns. Reps. 119.

4th. A *chose in action* belonging to the wife *before* marriage does not belong to the husband absolutely until he reduces it to possession, but a chose in action accruing to the wife *during* coverture belongs to the husband absolutely. 6 Johns. Reps. 119; 4 Dana, 333; 1 J. J. Marshall, 169; 3 Littell, 281.

SCOTT, J., *delivered the opinion of the Court.*

This was a proceeding commenced in the County Court of Howard County by Maupin the appellee, to obtain from J. J. Leakey, administrator of Jeremiah Leakey, deceased, a distributive share in right of his wife of the estate of the said Jeremiah Leakey. In 1841, Maupin married S. Leakey, a daughter of the said Jeremiah, who died intestate in March, 1842. In October, 1842, Sarah Leakey, the wife of Maupin the appellee, departed this life without issue, leaving heirs preferred to her husband as distributee under our statute of descents and distributions. No distribution of the estate of her deceased father had been made at the time of the death of Sarah Leakey. The County Court refused Maupin a distributive share of said estate in right of his deceased wife, and on an appeal to the Circuit Court that judgment was reversed, and the cause brought here.

The only question arising under this state of facts is whether Maupin, the husband of Sarah Leakey, deceased, or her heirs, are entitled to her distributive share in the estate of her deceased father?

If this was a question depending upon the English law for its solution, it could not admit of any doubt. By that law the right of the husband as administrator to his deceased wife's choses in action not reduced into possession during the coverture would be unquestionable, but as some of the provisions of the English law in relation to this subject have been omitted and others varying from them have been incorporated into our

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*Leakey, adm'r, &c. vs. Maupin.*

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system of laws, it becomes a question whether a husband under our law is entitled to his wife's choses in action not reduced into his possession during her life time, she leaving heirs preferred to the husband under our statute of distribution.

In ancient times when a man died intestate, the King as *parens patriæ*, took possession of his effects to be employed in defraying the expenses of his burial, paying his debts, and for the support of his wife and children or other kin. The execution of this trust was devolved on the clergy, and many abuses growing out of their conduct in relation to it, the statute of Westminster, 2, 13 Ed. I., which was said to be in affirmance of the common law, enacted that the ordinary should pay the debts of the intestate as far as his goods extended, in the same manner the executors were bound in case the deceased had left a will. But the residuum after payment of debts remained in the hands of the ordinary to be applied to any purposes his conscience might approve. Great abuses arising under the exercise of this power, the Legislature again interposed, and by the statute of 31st Ed. III., required the ordinary to depute the next and most lawful friends of the intestate to administer his goods. This is the origin of administrations in England. The statute 21st, Hen. VIII., enacted that administration might be granted by the ordinary to the widow of the deceased or his next of kin, or both in his discretion. In none of the statutes on the subject of administration is express mention made of the right of the husband to administer on his deceased wife's estate. His right was always unquestioned, and the only dispute was as to the source of that right; some holding that he held it under the statute 31st, Ed. III., as the next and most lawful friend of his wife; others, that he derived it from the common law, and that the husband *jure mariti* was entitled to administer on his deceased wife's effects, but the right being established and admitted on all hands, its source was a matter of no importance.

As the appointment of an executor was by the common law a gift to him of the residuum after the payment of funeral expenses and the debts, as a recompense for his trouble for administering, so the administrator coming in the place of the executor had the whole personal estate of the intestate after the payment of debts. 2 Bac. 72, the writ *de rationabile parte bonorum* to which the wife and children were entitled being grounded on the customs of London and York, and some other places. 3 Thos. Coke, 317. The hardship of this privilege upon the next of kin of the intestate, was the occasion of making the statute of 22 and 23 Chas. II., Cap. 10, which compelled the administrator, after the payment

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of funeral charges, debts and all expenses, to distribute the remainder of the personal estate to the wife and children and children's children, if any there be, or otherwise to the next of kindred to the dead person.

We have seen that the husband was entitled to administration on his deceased wife's estate, and like all other administrators, had by the common law, exclusive enjoyment of the residuum after the payment of debts. Doubts arose under the statute of Charles, before recited, whether the husband, like all other administrators, was not compelled to make distribution among the next of kin of the wife; to remove these doubts the 25th section was engrafted on the statute of frauds and perjuries, 29 Chas. II., which provided that the act of 22 and 23 of Chas. II., Cap. 10, nor any thing therein contained shall be construed to extend to the estates of *Femme Coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."

We have not adopted into our system of laws this section, but on the contrary, it is provided by the statute of descents and distributions, §3, that if there be no children nor their descendants, father, mother, brother nor sister, nor their descendants, nor any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or *husband* of the intestate. From the omission of a provision similar to that contained in the 25th section of the act of 29th, Chas. II., and the insertion of a provision that the husband should only receive his deceased wife's estate in the event of there being no children, father, mother, brother, sister, nor any maternal nor paternal kindred capable of taking, the inference would seem irresistible that it was not the intention of the Legislature that the husband should receive his wife's estate and not account for it as other administrators.

In order to surmount the obstacles to his claim presented by the dissimilarity between ours and the English system of laws in relation to this subject, it was contended by the appellee that there was a distinction between choses in action belonging to the wife at the time of marriage and those which accrued to her during coverture; that the former belong to the husband *sub modo*, provided that he reduces them to possession during coverture, otherwise, if the wife survive him, she will be entitled to them, but that the latter are an absolute gift to the husband, and in the event of the survivorship of the wife would belong to her. It must be confessed that the cases read from the Kentucky reports, 4 Dana, 333, and 1 J. J. Marshall, 169, 3 Little, 281, would seem to give

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some sanction to the distinction, but it is a little remarkable that while these cases hold that choses in action accruing to the wife during coverture, vest absolutely in the husband, yet they admit that if the wife survives the husband she will be entitled to them, and not his representatives; now nothing is clearer than that the property of the wife which vests in the husband absolutely, in the event of his death will belong to his representatives and not to the wife. There is therefore some inconsistency in the propositions.

Marriage is by law an unqualified gift to the husband of all the personal estate of the wife in her possession at the time of its taking place, and if he should die an hour after the marriage, having received a large personal estate from the wife, all of that estate except what our law allows to her as dower, would go to the kindred of the husband and not to the wife. But as to choses in action or mere rights to receive money or property from another the law only gives the husband a qualified right to them, viz: on condition that he reduces them to possession during coverture, and if he fails to do this, if the wife survive she will be entitled to them. This principle is applicable as well to choses belonging to the wife at the time of marriage as to those which accrue to her during coverture. The distinction between the two classes of choses is this, that in a suit to recover the former the wife must be joined with the husband,—in a suit for the latter the husband may join his wife or not at his election, if he sues alone and recovers judgment it is an election to have the chattel in his own right freed from the right of survivorship in the wife, if he joins her in the suit, her right of survivorship still continues after judgment.

That the foregoing is the only distinction between choses in action belonging to the wife at the time of marriage and those which accrue to her during coverture, may be shown by a great weight of authority. Chancellor Kent, 2 Com. 235, asserts the doctrine as though there was no doubt in relation to it, and in the case of *Schuyler vs. Hoyle*, 5 Johns. C. 196, it is maintained and English cases cited showing that choses in action existing both at the time of marriage and those accruing to the wife during coverture are only conditional gifts to the husband. The principle is asserted in *Garforth vs. Bradley*, 2 Ves. Sen., and in *Richards vs. Richards*, 2 Barn. & Adol. 452. Williams in his work on *Executors*, 605, says, marriage is only a qualified gift to the husband of the wife's choses in action, viz: upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession,

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she and not his representatives will be entitled to it; accordingly, the general rule of law is, that choses in action which are given either *before* or *after* marriage survive to her after the death of her husband, provided he has not reduced them into possession; but with this distinction that as to those which come during the coverture, the husband may for them bring an action in his own name; may disagree to the interest of his wife, and that recovering them in his own name is equal to reducing them into possession.

Most of the States of the Union have adopted the English law, and exempted the husband as administrator from the burthen of making distribution of his deceased wife's effects, but in a case in Alabama similar to this, owing to the omission in her code of a provision like that of the 25th section of 29, Chas. II., it was held by her Supreme Court that a husband was not entitled to a portion of his deceased wife's estate not reduced into possession during her life time. *Bibb vs. McKinley, et al.* 9 Ala. 636.

We are inclined to the opinion that the 1st section of the act relative to descents and distributions which directs "that when any person shall die intestate as to any real or personal estate, it shall descend and be distributed in parceny," &c., will not warrant the construction put upon it by the appellee. The words *descend and be distributed* are not to be applied both to the real and personal estate, the word *descend* must be regarded as applicable to the real estate, and the words *to be distributed* to the personal estate; as if the section read, the real estate shall descend, and the personal estate shall be distributed, &c. To hold that the personal estate on the death of an intestate descended to his heirs, would be to overturn all our notions in regard to the administration of such property, and would be productive of endless confusion in administering estates, but even if the right to the personal estate did descend to Maupin immediately on the death of his father-in-law, still it was a mere right. The possession rightfully went to the administrator, and he had not parted with that possession at the death of Maupin's wife.

In this case Maupin claimed as husband and not as administrator of his wife. Our statute gives the right of administering on his deceased wife's estate to the husband, and had Maupin claimed a distributive share of J. Leakey's estate as administrator of his wife, he would have been entitled to recover, but for the reasons given before, he would have held the amount received as trustee for his wife's next of kin.

The other Judges concurring, the judgment below is reversed, and it is considered that Maupin take nothing by his plaint, and that the appellant go hence without day and recover his costs.



*Curling & Robertson vs. Hyde.*

CURLING & ROBERTSON vs. HYDE.

An administrator or other person, holding money or property in a fiduciary character, can not be garnisheed for such money or property.

ERROR to Marion Circuit Court.

GLOVER & CAMPBELL, *for Plaintiffs, insist:*

That the judgment of the Circuit Court must be reversed:

1st. Because the interrogatories are addressed to Mahala J. R. Hyde, as administratrix of Edmund Hyde, deceased, and not in her individual character; no question, therefore, based upon her private indebtedness, would have been proper under the issue, yet the Circuit Court decided that her individual indebtedness was the proper subject of investigation.

2d. Because the Circuit Court erred in assuming that an administratrix could not be garnisheed, or that the fund in her hands could not be thus attached.

WELLS, *for Defendant, insists:*

1st. The bill of exceptions does not save the motion for new trial—the motion is not in the bill of exceptions.

2d. The issue was whether Mahala J. R. Hyde was indebted to defendant, and not whether the estate of Edmund Hyde was indebted. The evidence did not support the issue. The issue was on the answer, and not on the interrogatory.

3d. An administrator is not bound to answer as to the indebtedness of his intestate. An administrator is not a debtor within the meaning of the statute.

MCBRIDE, J., *delivered the opinion of the Court.*

Curling & Robertson, on the 19th April, 1844, at the Marion Circuit Court, recovered judgment against Wesley W. Hyde, for upwards of \$4,000.

On the 24th June, 1844, a writ of *feri facias* issued on said judgment, directed to the sheriff of Marion county, on which the defendant, Mahala J. Hyde, as administratrix of Edmund Hyde, deceased, amongst other persons, was summoned as garnishee on the 24th July, 1844.

At the October term, 1844, of the Marion Circuit Court, interrogatories were filed against the garnishees, as follows: "To Hiram Edmiston, Jordan W. Hyde, and Mahala J. R. Hyde, administratrix of the estate of Edmund Hyde, deceased—were you or either of you indebted, on the days on which you were respectively summoned as garnishees in this

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case, to Wesley W. Hyde, in any sum of money, if so how much, on what account, when due, what interest does it bear, if not due when will it become due?" R. C. 1835, 254, §8; ib. 78, §15, and following.

On the 14th November, 1844, a copy of the interrogatories was served on Mahala J. R. Hyde, who appeared at the Court and filed her answer, denying that she owed any money, or had any in her hands; to her answer a replication was filed.

On the trial of the issue made on the answer of Mahala J. Hyde, the plaintiff called a witness, who, being sworn, was asked by plaintiff's attorney if he knew whether Mahala J. Hyde, as administratrix of Edmund Hyde, deceased, was indebted to Wesley W. Hyde at the service of the garnishee upon her in this cause? The question was objected to by the defendant, and the objection sustained by the Court. Plaintiff then asked the witness to state if, at the date of the service of the garnishee in this case, the estate of Edmund Hyde was indebted to Wesley W. Hyde. To this question the defendant also objected, and the Court sustained the objection, to which the plaintiff excepted, and thereupon took a non-suit, with leave to move to set the same aside, which motion the plaintiff subsequently made, and the Court overruled the same, whereupon he excepted and has brought his case to this Court by writ of error.

Two points are preserved on the record, and are insisted on in this Court for the reversal of the judgment of the Circuit Court:

1st. The interrogatories being addressed to Mahala J. Hyde, as administratrix of Edmund Hyde, deceased, and not to her in her individual capacity, therefore, the evidence offered by the plaintiff, and rejected by the Court, should have been received.

2d. The Circuit Court erred in assuming that an administratrix could not be garnisheed; or that the funds in her hands could not be thus attached.

We will examine the second point first, inasmuch as the decision of that involves the merits of this controversy, and its adjudication will determine the first point.

Is the defendant, Mahala J. Hyde, in her fiduciary character, liable to this proceeding for a supposed indebtedness of her intestate to the defendant in the execution, Wesley W. Hyde?

Although this is a new question in this State, it being now presented for the first time to this Court, yet we are not altogether without the aid derived from the investigations given to the subject by other Courts in deciding it.

The Supreme Court of Massachusetts, in the case of Brooks vs. Cook,

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8 Mass. R. 246, which was a question whether one Barret was, by law, liable to be adjudged the trustee of the defendant. Barret had, at the time of the service of the writ upon him, no goods, effects, or credits of Cook in his possession, excepting as he, Barret, was administrator, &c. The Court declared that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind. We have determined this in the case of public officers, and the reason of those decisions applies with equal force to the case of an administrator." See 1 Cranch's R. 117; 3 Mass. R. 288; 7 Mass. R. 259; where the same opinion is fully recognized.

Marvel, et al., garnishees of Lyons, administrator of Houston, 2 Harrington's R. 349, was a case in the Supreme Court of Delaware, where John Houston, in his life time, recovered judgment against Wm. Lyons, in his life time, which judgment was revived by *scieri facias*, at the suit of Elizabeth Houston, executrix of John Houston vs. Richard Lyons, administrator of Wm. Lyons. On this judgment a *feri facias* issued for levying the debt, with a clause for summoning "the garnishees of the said Richard Lyons, administrator of Wm. Lyons, deceased." Under this process, Marvel and another were summoned, put to plead, and had judgment against them. The Court held that "the act of assembly settles the priority of payment of debts in the administration of assets, and it will not do to allow it to be disturbed in this way. By allowing the debtors of the estate to be garnisheed, the assets might be diverted from their lawful course of application. Thus, funds applicable to judgment debts, might be arrested and applied to simple contract debts; neither an administrator, therefore, nor a debtor of an estate, can be attached or summoned as a garnishee. This is the invariable decision."

The Supreme Court of Arkansas, (5 Ark. Reps. 55,) after reviewing the authorities on this subject, declare that "to subject executors or administrators to this process of garnishment, might destroy the whole operation and intention of our law of administration."

We are, therefore, of the opinion that from principle and analogy, a trustee, or one acting in a fiduciary character, is not subject to be garnisheed as such—that the assets in the hands or possession of a fiduciary, are to be paid out in such manner as the law prescribing the duties of such fiduciary directs, and not otherwise; that a contrary doctrine would inevitably lead to much embarrassment, and great inconvenience in the administration of estates. The most difficult and intricate questions of fraud might arise, which could not well be adjudicated in this summary proceeding by garnishment on execution.

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*McCurdy vs. McFarland.*


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By the provisions of our administration law, all claims, of whatever character, must be presented to and allowed by the County Court, and after allowance, are subject to be classed, and paid according to such classification, if the administrator has sufficient assets in his hands to pay the same, and if not, then to be paid *pro rata*. Whether the proceeding in this case against the administratrix could be sustained after an allowance and an order made by the county Court, for her to pay the demand, is not now before us, and need not be decided, but until a settlement by the administratrix, and an order to pay certain claims, embracing the one in question, we are clearly of opinion she is not liable in the manner here attempted.

The object of the evidence offered by the plaintiff, and excluded by the Court, being to fix a liability on the administratrix, as such, was under the view we have taken of the case, inadmissible, and the Court properly excluded it.

We are, therefore, of opinion that the Circuit Court committed no error, and the other Judges concurring, the judgment of the Circuit Court is affirmed.

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 McCURDY vs. McFARLAND.

1. There is no implied warranty of *good character* in the sale of a steer.
2. A vendor is not bound to disclose the *character* of a steer.

### ERROR to Cooper Circuit Court.

#### CHILTON, for Plaintiff in error, insists:

1st. The Circuit Court erred in refusing to permit said McCurdy to prove, on the trial, that said steer in controversy had been killed by reason of his mischievous habits in Speed's field—because a previous agreement and promise to keep said steer out of Speed's field had been proven to have been made by McFarland to McCurdy, at the time of said sale—and, therefore, any violation of said agreement and undertaking of McFarland, was a good defence to the recovery of the purchase money of said steer by McFarland from said McCurdy. See Revised Code 1845; 4th Pickering 275.

2d. The Court erred in giving the instructions asked by plaintiff in the Court below, because the same are irrelevant, and not supported by the evidence.

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3d. The Court erred in refusing the first instruction asked by McCurdy, for the reasons given above, in relation to the rejection of proof. See authorities above.

4th. Before the money was paid, McCurdy had a right to refuse to receive said steer, when Scott disclosed to him the mischievous character of said steer, which had been theretofore suppressed by McFarland—hence the agreement to keep said steer out of Speed's field was a part of the sale, or a condition touching it, which, if broken by McFarland, would be a good defence to a suit for the purchase money of said steer. See 4th Pickering 275, as above.

*HAYDEN, for Defendant in Error, insists :*

1st. That from the evidence in the cause the plaintiff in error bound himself, by his contract, to pay to McFarland \$20 for his steers, and that there is no evidence of facts or circumstances conducing to show that the obligation to do so, on the part of McCurdy, was not binding in law at the time of the contract, or that it has been fully discharged or satisfied by him at any time since.

2d. That the instructions asked by plaintiff were legal and properly given to the jury by the Court.

3d. That the instructions asked by defendant and refused by the Court, were properly refused by the Court, because, among other reasons, there was no evidence given in the cause to warrant the Court in giving the same, and because they required of the Court to usurp the place of the jury in deciding the facts of the case submitted to their decision.

4th. That the plaintiff in error cannot complain in this Court of the rejection of any evidence by the Circuit Court, which was offered by him to the jury, because he hath not, in his motion for a new trial, complained and assigned the same as a reason for demanding a new trial.

*NAPTON, J., delivered the opinion of the Court.*

McFarland, the defendant in error, sued the plaintiff in error, McCurdy, before a justice of the peace in Cooper county, for ten dollars, alleged to be due on account of a purchase of a yoke of steers. McFarland obtained a judgment for ten dollars before the justice, and subsequently in the Circuit Court, to which the case was taken by appeal, he also got a verdict and judgment.

The facts, as proven by a witness, who was called upon to witness the payment of ten dollars on this contract, were:—that upon this occasion, the witness observed that one of the steers was a very mischievous, or, as the witness expressed it, a very "*breachy*" steer, and that he would probably be in one Speed's field; that upon learning this, McCurdy expressed some dissatisfaction, whereupon McFarland said he would take care to keep him out of Speed's field; that thereupon, the ten dollars were paid. It appeared that the steer had a mischievous habit of breaking fences, and it was proposed to be proved, that the steer had been killed in Speed's enclosure, on account of his bad character. This evidence was, however, rejected. It appeared, also, that McFarland did not disclose to McCurdy this mischievous propensity of the steer.



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*McCurdy vs. McFarland.*

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The Court instructed the jury, first, "That if the jury find from the evidence that the plaintiff sold the steers in controversy for twenty dollars, and the same has not been paid, and that the defendant knew the character of the steer, and received him with such knowledge, they will find for the plaintiff;" and secondly, "that if the defendant purchased said steer, without any knowledge of any defects in it, and such defects came to his knowledge before bringing this suit, and that he failed to return or offer to return him, he was liable for the price of said steer."

The defendant asked the following instructions, which were refused: If the jury believe that the plaintiff sold to the defendant the steer in question, without disclosing to him the character of said steer, and the jury further find that said steer was unmanageable and mischievous, the defendant had a right to refuse to accept said steer, and if he did so refuse to accept him, and did afterwards accept him upon the condition that McFarland should keep him out of Speed's field, and that condition was not performed by McFarland, he is not liable for the price of said steer.

Exceptions were taken to the instructions given, and to the refusal of those asked for by the defendant, and the case brought here by writ of error.

The instructions, which the Circuit Court gave to the jury, as well as those which were refused, are based upon the assumption that in the sale of cattle there is an implied warranty of their freedom from all vicious propensities and mischievous habits. The same principle would hold the vendor of a slave responsible for his moral character as well as his physical soundness. The difficulty of fixing on a standard by which the moral character of either a slave or a steer could be determined, presents a very formidable objection to the adoption of any such doctrine, whether it is to be applied to the transfer of irresponsible animals, or of slaves. For this reason, it has been held that the vendor of a slave does not warrant his moral character. *Smith vs. McCall*, 1 McCord's Rep. 220. To one purchaser, a slave who was addicted to lying or stealing, or running away, might be entirely valueless, whilst another might regard these vicious propensities as not in the slightest degree impairing his value. So a steer, purchased by a butcher, might have a great many bad qualities, which would unfit him for the yoke, and yet be not the less acceptable to the purchaser. Even where cattle are purchased for the draught, it would depend very much upon the particular employment for which they were designed, whether a habit of breaking fences would constitute a serious objection to them. It must, therefore, depend upon a great many

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considerations, foreign from the contract, to determine what habits shall be held to vitiate it, and what not. It is better that purchasers should be left to protect themselves by special warranties.

The instructions which the Court gave, were rather prejudicial to the plaintiff, but as he is not the party complaining in this Court, they will be no ground for reversing the judgment. The instructions which the defendant asked, seemed to be designed to place the case upon the ground of conditional contract, and a failure by the plaintiff to comply with the condition precedent. There was proof of a promise, by the plaintiff, to keep the steer complained of out of Speed's field, but this promise, it seems, was made after the completion of the original contract, and did not form any part of that contract. The instruction asked concedes that it did not, but assumes that this condition was engrafted into the contract previous to the actual acceptance of one of the steers, and that, therefore, a recovery could not be had without proving a compliance with this condition. The answer to this is, that a promise so made after the consummation of the contract, would be without consideration, and, therefore, not binding. The instruction moreover assumed that the vendor was bound to disclose the character of the steer, and for this reason alone was properly refused.

The other Judges concurring, the judgment is affirmed.

TEVIS, SCOTT & TEVIS vs. HUGHES.

A suit by attachment ought not to be dismissed for any insufficiency in the bond, until the Court has given time and the plaintiff has failed to file a new bond.

ERROR to Lewis Circuit Court.

ELLISON, for Plaintiffs in Error.

The only question seems to be whether a bond, signed by a firm in the partnership name, be a bond or not. The law governing the case will be found in 1st Mo. R. p. 139, and in Collier on Partnership 258-9; these authorities will, it is presumed, show the bond in this case to be good, at least against him who executed, and it was approved as good by the clerk.

If the bond was not good, yet the suit should not have been dismissed, but time should have been given to amend it. See Stat. 1845, p. 135, §6.

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**GREEN & STRINGFELLOW, for Defendant.**

1st. The bond in this case is insufficient. It is not shewn that the security, if any, was a resident householder of Lewis county.

It is also insisted that there is no security to the bond, partners must have special authority to execute a bond. 1 Hen. & Mun. 422; 3 Munf. 189; 9 Johns. R. 285; 19 do. 513; 2 Pickering 345; 8 Pick. 326.

2d. No tender of a sufficient bond was made—and the bond filed being insufficient, the suit should have been dismissed.

**SCOTT, J., delivered the opinion of the Court.**

The plaintiffs in error commenced proceedings against the defendant by attachment, for the recovery of a sum of money. On the return of the writ, the defendant appeared and moved to quash the writ, for the reasons that the bond required by law before the issuance of a writ of attachment was not in pursuance of the statute; that no attachment bond was filed; that the bond filed was void. The bond, it seems, was executed by two of the plaintiffs, Tevis & Scott, as principals, whose names are inserted in the obligatory part of it, with a blank for the names of the sureties: the bond was executed by the two principals, and by Hotsenpiller & Agee, in their partnership name.

The Court sustained the motion, and dismissed the suit.

The statute regulating attachments, enacts that if the bond required by law, to be filed before the issuance of an attachment, shall be deemed insufficient, the Court, after notice to the opposite party, shall, by order, direct another bond to be executed within a limited time, and upon a non-compliance with this order, by the plaintiff, his suit shall be dismissed.

These provisions of the law were not complied with, but the Court, assuming the bond to be a nullity, treated it as such, and dismissed the suit, as though it had been instituted without filing any bond.

The bond for an attachment was first required by the act of February 6th, 1837. That act made no provision for sustaining the proceedings in the event of the bond being judged insufficient by the Court in which they originated; the consequence was, that many attachments were dismissed owing to the carelessness of parties and others in preparing and executing bonds. To correct this evil, the act of February 13th, 1839, was enacted, which contained the provisions above referred to respecting insufficient attachment bonds; this is a remedial statute, and should be construed liberally. It cannot, with any propriety, be said that the bond filed upon the commencement of the proceedings in this cause, is a nullity.

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*Wood & Oliver vs. Ellis, adm'r, &c.*

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It was certainly the bond of the two principals, who executed it. As to the execution of it, in a partnership name, it was at least the bond of that partner who executed it, if the assent of the other could not be shown; although the omission of the name of the surety in the obligatory part of the bond, (the names of the other obligors having been inserted,) may have affected his responsibility, yet there was such a bond in the meaning of the act as should have induced the Court to make an order directing another bond to be filed. 11 Ohio R. 420.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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WOOD & OLIVER vs. ELLIS, ADM'R, &c.

1. A judgment, confessed by an attorney, is not void although the letter of attorney be void.
2. Where such a judgment has been revived by *sci. fa.*, against an administrator, it can not afterwards be set aside, although the defect in the letter of attorney might have been pleaded in avoidance of the judgment, or given in evidence under the plea of *nul tiel record* on the *sci. fa.*

### ERROR to Lewis Circuit Court.

GLOVER & CAMPBELL, for Plaintiffs, insist:

1st. The warrant of attorney was good to authorize the judgment confessed. See 5 Mass. Rep. 358. In this case the party, by a memorandum at the bottom of the note, acknowledged himself "surety"—was held to be original promissor—also shows an instrument commencing "I promise," but signed by two persons—binds both. 1 Bibb R. 262; see 4 Littell 390. A judgment, literally against one defendant, construed to be valid against both defendants. See 7 N. Hamp. Rep. 232, one seal to a deed was held to be the seal of all the signers. The same case shows it is not necessary the names should appear in the instrument; the *signing* and *sealing* being sufficient. The case in 6 Rand. R. p. 39, proves that a sealed instrument beginning "I promise," and concluding "I bind myself," and signed by two, is the deed of both. See 7 Mass. Rep. 58, to same effect.

2d. The judgment was valid, and ought to have been sustained, had no warrant of attorney appeared. In *Denton vs. Noyes*, 6 John. Rep. 300, an attorney appeared for a defendant, not summoned, and confessed judgment. The Court say the attorney may be liable, but the judgment can not be set aside. See also 6 Pick. 237, where it is laid down if the record shows the defendant appeared in the case, the judgment is valid, *prima facie*, at least. 1 Binney 214. "The judgment must be affirmed," "an attorney appeared for both parties." In *Hills vs. Ross*, 3 Dallas 331, the plea ran thus, "the plea of Ebenezer Hills, one of the company of Hills, May & Woodledge, in behalf of himself and partners." There was evidence on the record that May had been in Europe

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during the whole proceeding—and no warrant of attorney or other authority was shown—held to be an appearance of all the defendants. In 7 Pick. 137, held that notice to take depositions, to an attorney who appeared without any authority, was good. 3 Taunton 485, where the attorney refers a case to arbitration, without authority, the client is bound by the act. In 1 Salk. 86, it is said an attorney's consent binds his client, though contrary to his express orders. If an attorney appear, the Court looks no further. Ib. p. 88, an attorney appeared and judgment was entered against his client, without any warrant of attorney—the Court refused to set the judgment aside. 6 Mo. Rep. 439, shows a judgment good without authority in the attorney.

3d. The points raised upon the motion to set aside, were all sunk and merged by the judgment on the *scire facias*. 1 Cowper 727. That the warrant of attorney was obtained upon a usurious consideration, should be tried on issues made under a *scire facias*. "If *scire facias* be brought on a judgment, defendant may plead *nul tiel record*." 2 Tidd's Prac. 1184. Now if this judgment was void, there was no record, but the defendant omitting to plead is estopped forever. Ib. 1185; 1 Salk. 93, 264; 1 Strange Rep. 197. Matter pleadable to *scire facias*, is barred by award of execution—when a judgment has been revived by *scire facias*, the Court has no power to arrest execution on it. 1 John. Rep. 534, note Kent's opinion; see 7 Mo. R. 334.

4th. The motion to set aside a judgment rendered on warrant of attorney, must be supported by affidavit, and must show some ground of defence against the demand, and show some advantage taken of the defendant. 2 Chitty's Gen. Practice 335; 1 Chitty's Rep. 142; 6 John. Rep. 296.

5th. A motion to set aside a judgment obtained on warrant of attorney, is always addressed to the equitable discretion of the Court, and should be permitted to stand as a security for the sum really due. 2 Chitty's Gen. Prac. 335.

6th. The motion, at the time it was made, was barred by time. See R. C. 1845, p. 831, §8; 1 Bibb Rep. 346.

*GREEN & STRINGFELLOW, for Defendant, insist:*

1st. The judgment confessed by Wright, as attorney for Pemberton, is void as to Pemberton, he not having executed the letter of attorney. 18 John. Rep. 363; 15 East. 592; 2 Leigh 630; 2 Tucker's Com. 275; Catlin vs. Ware, 9 Mass. R. 218.

2d. The power of attorney only authorized a judgment against Glenn.

3d. The judgment being void, may be set aside at any time. The statute of *jeofails* does not apply, this being a judgment which requires a warrant of attorney.

4th. The judgment on the *scire facias*, does not affect this case—it makes the judgment no better—and is only a judgment of revivor.

5th. The evidence of this judgment is irrelevant.

*SCOTT, J., delivered the opinion of the Court.*

James D. Glenn and Wm. S. Pemberton, who were indebted by note to Wood & Oliver, executed a power of attorney to U. Wright, S. T. Glover, and J. D. Dryden, or either of them, to confess a judgment in their stead in favor of the said Wood & Oliver, in the Lewis Circuit Court, at the March term thereof, in 1841. This power of attorney was executed both by Glenn and Pemberton, the name of Glenn alone was inserted in



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the body of the instrument, it reading thus: "Know all men by the presents, that I, James Glenn, do hereby constitute and appoint," &c., omitting the name of Pemberton, which was subscribed to the instrument as a party thereto.

Judgment was accordingly confessed, and Pemberton afterwards died, and the judgment was revived against John W. Forman, his administrator, who was served with process. Wm. Ellis was afterwards appointed administrator, *de bonis non*, of the estate of Pemberton. Afterwards, in May, 1846, a motion is made to set aside the judgment against Pemberton, on the ground that his name not being inserted in the body of the power, whilst that of Glenn was, it was only the act of Glenn, and that as to Pemberton, although he executed it, it was a nullity. This motion was sustained, and the judgment vacated.

Admitting the rule as stated in the books to be that if there are several obligors, they ought all to be named in the bond, for if a bond be in these words, "We, A. and B., bind ourselves," &c., be also sealed by C., it is not C.'s bond. So a bond in these words, "I, A. B., am bound to C.," although it be signed by D., is not D.'s bond, 1 Tuck. Com. 275, yet it will not follow that the Court did right in vacating the judgment. Motions of the character of that made in this cause, have been substituted for the ancient writ of *audita querula*, which is an equitable action, which lies for a person who is either in execution or in danger of being so upon a judgment, when he has matter to show that such execution ought not to have issued against him, and is of a most remedial nature, and seems to have been invented lest in any case there would be an oppressive defect of justice, when the party has a good defence, but *had* not has any other means to take advantage of it. 3 Black. Com. 405: It does not lie where there is any other remedy at law by plea or otherwise. And, therefore, where the party had time to take advantage of the matter which he has in discharge of himself, and neglected it, he cannot afterwards be relieved by *audita querula*, as where the plaintiff having obtained judgment against the defendant, and afterwards releases it, and after bringing *sci. fa.* upon the judgment, and the sheriff returns *scire feci*, and the defendant does not appear, and there is a judgment upon it, he cannot have an *audita querula*, for he had time to plead the release upon the *scire facias*, and having neglected it, the law will not relieve him. Fitz. N. B. 104; 1 Sal. 264. So if on a *scire facias* on a recognizance, the party is returned warned, and makes default, he cannot avoid it by *audita querula*, upon the ground that the recognizance was upon condition, which he has performed, or other matter, because he had a day to answer it. Ibid.

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*Gregg vs. Macey & Winston.*


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To a *scire facias* to revive a judgment, the defendant may plead *nul tiel record*. Tidd 1184. If the judgment against Pemberton had been a nullity, *nul tiel record* would have been a proper plea to it. The judgment in this case might have been set aside, on motion before the *scire facias* to revive the judgment, but after a judgment on that writ against a party, it would seem according to the principles above stated, that he would come too late with a defence that might previously have been made.

These motions, it has been seen, are substituted for the writ of *aūdita querula*, which is an equitable proceeding. It is not pretended but that Pemberton owed the debt, for which the judgment was confessed, nor is it denied but that he executed the power of attorney. There was a formal defect in that instrument, which might have enabled him to have avoided it. But that defect did not render the judgment void. His objection is a dry technical point, against which Courts of equity have relieved, though it may prevail at law. *Berry vs. Radcliff*, 6 John. C.; 1 Equity Cases Abridged 188. In exercising the power of vacating judgments, the Courts will do it on terms, and take care that justice be done between the parties.

The other Judges concurring, the judgment will be reversed.

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GREGG vs. MACEY & WINSTON.

A deed is not void, if its covenants can be ascertained by an examination of the whole instrument, although some isolated covenant may be uncertain and difficult to understand when not connected with the other parts of the deed.

### ERROR to Platte Circuit Court.

#### ALMOND for Plaintiff.

The plaintiff demurred to defendant's pleas; the Court overruled the demurrer and gave judgment against the plaintiff, and the only question raised on said demurrer is as to the sufficiency of the declaration, as the defendants did not, and I presume will not insist on the sufficiency of either of their said pleas. The ground upon which the Circuit Court overruled said demurrer was, that the declaration was insufficient in not averring the payment of the purchase money by plaintiff, and a demand on defendants for a deed before suit brought. The bond sued on, with the condition there underwritten, does not require the plaintiff to demand a deed or to pay the purchase

*Gregg vs. Macey & Winston.*

money, before his right of action accrued on said bond. But the right of action accrued on the penalty in said bond immediately on its execution, and continues until defendants defeat it, by complying with the condition.

*THOMAS for Defendants.*

There are two questions presented on the face of the pleadings for the consideration of the Court:—

1st. Does the instrument described in the plaintiff's declaration give him a right of action? and if so,

2ndly. Have the facts been properly pleaded?

The defendants insist that the instrument as described in the declaration is void for uncertainty in this, that it does not show with whom the covenants were made. *Tate vs. Barcroft*, 1 Mo. Rep. 115; *Perkins vs. Reed*, administrator of Nash, 8 Mo. R. 33. Nor what act the covenantors were to perform in relation to "lot number four;" and is in other respects ambiguous and uncertain. If "sufficient and legal words properly disposed" are essential to the validity of all instruments of this nature, the bond which is the foundation of this action is certainly void. 2 Bla. Com. 298—308.

The declaration is bad. 1st. Because the breach varies from the sense and substance of the contract in alleging a failure to do that which defendants never covenanted to do. 1 Chit. Pl. 367—368. 2ndly. For duplicity in assigning two breaches in one count of the same specific stipulation. 1 Chit. Pleadings, 369.

*McBRIDE, J., delivered the opinion of the Court.*

The plaintiff brought his action of debt in the Platte Circuit Court against the defendant on a bond for the conveyance of two lots of ground in the town of Winston, in Platte County, Mo., with a condition underwritten. The declaration sets out the condition of the bond as follows: "That whereas the said Joseph Winston and William M. Macey that day sold to Riley Gregg lot number twenty-eight, and have sold to Riley Gregg and Thomas Gregg lot number four in the town of Winston, in Platte County, Mo., for the payment of which the said Riley Gregg and Thomas Gregg had that day executed their promissory notes due and payable in one, two and three years, with ten per cent. interest from date until paid. Now as soon as the said Joseph Winston and William M. Macey should make a good and sufficient deed of lot number twenty-eight, and to Riley Gregg and Thomas Gregg lot number four, then the said writing obligatory was to be void, otherwise to be and remain in full force." The declaration then proceeds to assign as breaches that the defendants have not made, &c., a good and sufficient deed to lot number twenty-eight to said Riley Gregg, &c., nor have they, &c., made to the said Riley Gregg and Thomas Gregg a good and sufficient deed for said lot number four, according, &c. The defendants pleaded *nil*

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*debit, non est factum*, without affidavit, and a special plea setting forth that through mistake the defendants had become bound in said bond, when in fact and in truth it was the intention of the parties that the said plaintiff should be bound, and concluding with a verification.

The plaintiff took issue on the second plea and filed his demurrer to the first and third pleas of the defendants. The Court overruled the demurrers and entered judgment thereon against the plaintiff, who has brought the case here by writ of error.

It is understood that the judgment of the Circuit Court was given upon a supposed defect in the declaration. That although the pleas demurred to were admitted to be bad, yet they were as good as the plaintiff's declaration, and that the demurrer to the pleas operated as a demurrer to the declaration also. It then becomes necessary to examine the declaration and to see whether a demurrer would lie to it.

The declaration declares on a bond executed by the defendants under their hands and seals to the plaintiff for the sum of fifteen hundred dollars—setting out the bond according to its legal effect; it then avers that the said bond has a condition underwritten, and sets out the same, and assigns as a breach the failure of the said defendants to make a deed or deeds to the lots therein specified. In all this we can see no cause of demurrer. But it is said that the writing declared on in the declaration is void for the want of certainty. The writing, although not very skillfully drawn, appears to me to be entirely intelligible, just such an instrument as the plain unsophisticated people of our country would be expected to draw up in their business transactions with each other. If such an objection should receive the sanction of the Courts, the Courts would become engines of great wrong to the mass of the community who are in the daily habit of drawing up such contracts. The Courts must examine carefully and patiently to ascertain what are the contracts of parties, and when ascertained endeavor to enforce them—and not turn parties out of Court unless indeed they have been so very unfortunate as to have failed entirely in making themselves understood.

The condition of the bond does not state distinctly to whom the title to lot No. 28 is to be made, but in the foregoing part it is said that the lot was sold to Riley Gregg, and hence the deed was to be made to him as is averred in the declaration.

Not being able to discover any substantial defect in the declaration, and the pleas being bad, we are of opinion that the Court erred in overruling the demurrers to the defendants' first and third pleas, and its judgment is therefore reversed, and the cause remanded.

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*Bledsoe vs. The State.*

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## BLEDSOE vs. THE STATE.

The 27th section of the act concerning groceries and dram-shops, as printed in the Revised Code of 1845, held to be the correct exposition of that act—and to authorize the sale of spirituous liquors in quantities not less than one quart, at the distance of one mile from a town or village, and not to be drank at the place of sale.

## ERROR to Buchanan Circuit Court.

GARDENHIRE, *for Plaintiff, insists:*

- 1st. The Court gave erroneous instructions to the jury. R. S. 545, §27.
- 2d. The verdict of the jury is contrary to the evidence.

ATTORNEY GENERAL *for the State.*

McBRIDE, J., *delivered the opinion of the Court.*

At the March term, 1846, of the Circuit Court of Buchanan county, the defendant Bledsoe was indicted for selling intoxicating liquor without license, and at the September term following was tried and convicted.

The evidence adduced upon the trial, as preserved in the bill of exceptions, shows that Ambrose Agee, a witness for the State, in the fall of 1846, went to the field of Bledsoe, where he was at work, and asked him for whiskey—Bledsoe told him to go to his (Bledsoe's) house, and his wife would let him have it. He went accordingly, and the wife of Bledsoe let him have a quart of whiskey, for which he paid her ten cents. That the whiskey was purchased by witness of Bledsoe's wife, at the distance of four or five miles from any town or village, and was not drank at the place of sale.

Thereupon the Court instructed the jury, "that if, after the 25th June, 1845, and before the 26th March, 1846, the wife of the defendant sold a quart of whiskey to the witness Agee, by the consent and direction of the defendant, they will convict upon the first count in the indictment; or, if they believe that less than a quart was so sold by such consent and direction after the first Monday in June, 1845, and before the 26th March, 1846, they will convict on the second count in the indictment; but, if the whiskey was not so sold by the consent and direction of the defendant.



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*State vs. Kyle.*

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or if not sold within the periods aforesaid, they will acquit. If they convict, the fine is not less than \$20, nor more than \$100."

The defendant excepted to the instruction given, and after verdict moved for a new trial, because the Court erred in giving this instruction to the jury, and that the finding of the jury was against evidence, &c., which being overruled, he has brought the case here by writ of error, and assigns for error—*first*, the Court gave erroneous instructions to the jury—*second*, the verdict of the jury is contrary to the evidence.

The first point raised involves an interpretation of the law regulating dram shops and groceries. R. C. 1845, p. 545, §26, 27. This statute is a revision of the statute of 1835, and the subsequent acts of 1841, p. 84, and 1843, p. 69. By the latter act the exemption was first introduced into our laws as an amendment to the 27th section of the former act. On an examination of the several enactments concerning groceries and dram shops, it is manifest that an error was committed as stated by the commissioner, otherwise it would have been useless for the revisors to have noticed the provision at all. It cannot be supposed that it was purposely appended to the latter end of section 26, in the enrolled bill, for the purpose of making it unmeaning and nugatory. Append the clause to the end of section 27, and we have substantially the same provision on the subject which was in force prior to the revision of 1845, and we are satisfied it should be so read to give effect to the intention of the legislature.

If, then, the penalties of the law were not intended to embrace those who shall sell spirituous liquors in quantities not less than one quart, at the distance of one mile from any town or village, and not to be drank at the place of sale, the Circuit Court committed error in instructing the jury, and its judgment is reversed.

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STATE vs. KYLE.

An indictment for betting on any game prohibited by our statutes, need not allege that the game was played in the County in which the bet was made. The betting is the offence, and it matters not where the game was played.

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*State vs. Kyle.*

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## ERROR to Chariton Circuit Court.

STRINGFELLOW, Attorney General, and J. V. TURNER, *for the State.*

1st. The indictment need not allege where the *game was played*. The defendant was indicted not for the *playing* but for *betting*, and if the betting was done in the County in which the indictment was found, it is immaterial where the game was played; if it were necessary to allege that the playing as well as the betting took place in the County in which the indictment was found, the statute could be evaded by placing the players on one side of a County line and the betters on the other; in that case the offenders would be indictable in neither County. It is clear that gaming under such circumstances would be a violation of the law, and that the betters should be indicted in the County in which the bet was made—the offence not being committed within five hundred yards of the County line.

2nd. The place of the playing is alleged in the indictment. It is alleged that the defendant in the County of Chariton bet, &c., on a gaming device *then and there adapted*, &c., for the purpose of playing a game of chance, &c., which is equivalent to alleging that the device was then and there *used* for that purpose, or that the game bet upon was then and there played.

3rd. The only use of a venue in an indictment is to show that the indictment was found by a grand jury having cognizance of the offence, and it is therefore unnecessary to lay a venue to any fact that it is not necessary to prove occurred within the County.

*HALL for Defendant.*McBRIDE, J., *delivered the opinion of the Court.*

At the October Term, 1845, of the Chariton Circuit Court, Samuel B. Kyle was indicted for gaming. The Court, on the motion of the defendant, quashed the indictment, and the State thereupon prosecuted her writ of error to this Court, and now assigns for error the quashing of the indictment.

The indictment charges that the defendant “did on, &c., at the County aforesaid, bet property, to-wit: &c., upon a certain gaming device, then and there adapted, devised and designed for the purpose of playing a game of chance for money and property; that is to say upon a gaming device commonly called cards, against the peace, &c.”

The reason on which the Circuit Court was asked to quash the indictment as set forth in the motion is, that it is not alleged where the gambling device was played.

The indictment charges the defendant with *betting*, which is an offence under our statute, as well as playing for money or property, and it charges very distinctly that the *betting* took place in Chariton County. Here, then, the gist of the offence is the *betting*, and it is immaterial

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*State vs. Martin.*


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where the playing took place. As if the defendant should know that a game of cards, or any other prohibited game, was to be played in St. Louis at a certain time, and was to make a wager that the one or other of the players would win, or that the game would terminate in a particular manner—here would be a violation of the statute, committed in Chariton County, whilst the game would be played in St. Louis. The better residing in Chariton and making the bet there would have to be indicted in that County, whilst the players would be subject to indictment in St. Louis.

The Circuit Attorney insists that if it be necessary to allege time and place where the playing occurred, it is sufficiently laid in the indictment. It is uncertain and perhaps therefore bad, whether the words *then and there*, immediately preceding the words adapted, devised and designed, were intended to apply to the use of the gaming device, or its adaptation to such a purpose.

For the foregoing reasons we are of opinion that the Court committed error in quashing the indictment; its judgment is therefore reversed, and the cause remanded for further proceedings in that Court.

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 STATE vs. MARTIN.

The middle name of a person is no part of the christian name.

### ERROR to Platte Circuit Court.

STRINGFELLOW, *for the State, insists:*

That it is not necessary to set out all the names of the defendant; it is sufficient to set out one of the christian names. The plea admits that the name set out is the true name, but is not all the name. This is unnecessary, and the plea was bad.

HAYDEN & WILSON, *for Defendant.*

The defendant insists that although the State might have replied that defendant was known as well by the name of "William" as "John William," yet the plea being good on its face, the Court below committed no error in overruling the demurrer. See 1 Chitty's Pleading. 1 Chitty's Crim. Law.

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*Kerby & Potter vs. Chadwell.*

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McBRIDE, J., *delivered the opinion of the Court.*

Martin was indicted by the grand jury of Platte County for gaming, by the name of William Martin. He pleaded in abatement that "he was named and is called John William Martin," &c. To this plea the Circuit Attorney filed a general demurrer, which was overruled by the Circuit Court, and the case is brought here by the State on writ of error.

It has been held, and we think correctly, that the middle name of an individual forms no part of the christian name. If this be correct, then the indictment cannot be sustained, as it only sets out the middle name, and does not give the christian name at all. Difficulties and confusion frequently arise growing out of the multiplicity of names given to individuals, and by which they are known: to obviate this, they should be named as they are generally called in society, and then if they plead in abatement, the plaintiff can reply the fact and maintain his action. See 5 D. & E. 195, where the defendants' christian names were transposed and the transposition held bad on demurrer.

Judgment affirmed.

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KERBY & POTTER vs. CHADWELL.

The neglect of an Attorney to file a plea to an action is no cause for setting aside a judgment by default.

APPEAL from Dade Circuit Court.

RICHARDSON *for Appellant.*

JONES *for Appellee.*

The appellee contends that the judgment of the Court should be affirmed.

1. Because according to the provisions of the 5th section of the act regulating petition in debt, R. C. 1845, page 802, the Court has no discretion, and cannot extend the time for pleading. It is a positive Legislative enactment, and there is no section in the act explanatory thereof or which gives discretionary power to the Court.

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*Kirby & Potter vs. Chadwell.*

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2. Because the 14th section of the act regulating practice at law, R. C. 1845, page 810, is only applicable to pleading under that act, and does not extend to actions brought by petition in debt.

3. Because, if it was a matter in the discretion of the Court, the Supreme Court will not undertake to decide whether the Circuit Court exercised its discretion soundly or wisely, unless there has been a gross, unwise or palpable misexercise of that discretion.

4. Because something more than a mere affidavit of merits is requisite, and due diligence should be shown in order to entitle the party to have the judgment by default set aside. Vide 4 Mo. Reps. 567; 7 Mo. Reps. 256; Wendell, 517.

McBRIDE, J., *delivered the opinion of the Court.*

Samuel Chadwell brought his action by petition and summons in the Dade Circuit Court against John C. Kirby and Burton Potter on a promissory note for \$100. The process having been personally served more than fifteen days before the return day of the April Term of said Court, 1846, and the defendants not having pleaded, or answered the action on or before the second day of the term, judgment by default was entered against them by the Court, on the third day of the term. On the fifth day of the term a motion to set aside the judgment by default was filed together with the affidavit of one of the defendants in the cause, and also the affidavit of William H. Otter, an attorney at law in said Court, in support of said motion. On the sixth day of said term the motion was heard and the same was by the Court overruled. To the opinion of the Court in overruling the motion the defendants excepted, and appealed to this Court.

The bill of exceptions contains the affidavit of the defendant Kirby, sustained by that of Otter, and sets out substantially that on the first day of the term, Kirby spoke to Otter to file a plea for him in the cause. That the note was given for a gaming consideration, that the attorney through inadvertence omitted to plead, whereby judgment by default was rendered against the defendants. The attorney states in addition that on the first day of the term he was appointed *Circuit Attorney, pro tempore*, in consequence of the illness of that officer, and that as there was a good deal of business before the grand jury and in the Court requiring his attention, he forgot his engagement and omitted to file the plea in time.

The omission of the attorney spoken to in the cause to plead within the time prescribed by law, cannot place the application to set aside the judgment by default upon more favorable grounds than if the omission had been on the part of the defendant himself. The attorney is the agent of the party employing him, and in the Court stands in his stead,



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and any act of the attorney must from necessity be considered as the act of his client, and obligatory on the client. This principle is so well understood and has been so long acted upon as to render it almost useless to refer to it—a different principle could not be tolerated by the Courts without immediately leading to endless confusion and difficulty in the administration of justice.

The affidavits do not show a sufficient legal excuse for failing to plead, and we are of opinion that the Circuit Court did not err in overruling the motion to set aside the judgment by default. See further on this subject, *Field & Cathcart vs. Matson*, 8 Mo. Reps. 686.

Judgment affirmed.

## SMITH vs. WILLING.

1. In action of ejectment for land sold under execution, brought against the defendant in the execution, the deed from the sheriff is valid, and may be read in evidence although not recorded.
2. It is no variance in a declaration to set out part of the description of a tract of land, which is omitted in the sheriff's deed, the description as supplied in the declaration not conflicting but consisting with the description in the deed.

## ERROR to Callaway Circuit Court.

JONES *for Plaintiff.*

ANSELL *for Defendant.*

McBRIDE, J., *delivered the opinion of the Court.*

Smith brought his action of ejectment against Willing in the Callaway Circuit Court, to recover a tract of land lying in said county. On the trial, he offered in evidence a deed, (having first proven a judgment and execution obtained in said Court, by James H. Smith against Willing, &c.,) from the sheriff of Callaway county, to him for the land in controversy, the same having been sold under the execution aforesaid, and pur-

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*Smith vs. Willing.*

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chased by him. To the reading of the deed in evidence, the defendant objected, and the Court sustained the objection; whereupon the plaintiff took a non-suit, with leave to move to set the same aside, which motion he subsequently made, and the same having been overruled, he has brought the case here by writ of error.

The record shows two grounds upon which the motion to exclude the deed was predicated,—first, the deed had not been admitted to record, in the recorder's office of said county, prior thereto,—second, there is a variance between the description of the land in the deed and that set forth in the declaration.

On the subject of recording deeds, our statute provides that "no such instrument, in writing, shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." Rev. C. 1845, §42, p. 226.

We do not think the exclusion of the deed, by the Circuit Court, can be sustained under this section, for in contemplation of law, Willing may be regarded as a party to the deed, acting by and through the sheriff, who disposes of the land for his benefit, and appropriates the proceeds to the payment of his debts. If Willing be regarded as a party to the deed, then he does not come within the exception of the statute, and to authorize his deed to be read against him, in any action wherein it would be legal evidence, it was not necessary that it should be first recorded. Why should it be recorded before offered in evidence? The record would impart no notice to him,—it would not give any additional legal force and effect to the deed.

Is there a variance in the description of the land, as set out in the declaration, and that contained in the deed from the sheriff to the plaintiff; if there is, is the variance material?

The land in controversy, is a tract of thirty acres, lying in the form of a parallelogram. The declaration gives the courses and distances of all the lines—the deed from the sheriff omits the course of the last line, but gives the distance from the last named point to the beginning. If a line were run from the point last given by the sheriff's deed, to the beginning, it would necessarily be a line as described in the declaration. The declaration, then, only supplies an unimportant omission in the deed, and in doing so, does not produce a variance which should exclude the deed as evidence. The description in the deed, and that in the declaration, are not repugnant, but are the same as far as the deed goes—the deed does not contain a description of other and different lands than those set

*Baker vs. Brown, assignee, &c.*

out in the declaration, but the same identical land, omitting a call which cannot be different from that in the declaration.

The judgment of the Circuit Court is reversed, and the cause remanded.

BAKER vs. BROWN, ASSIGNEE, &c.

1. As between the original parties to a bond or note, a set off is allowed, although the bond or note be payable "without defalcation or discount."
2. If such an instrument be fraudulently assigned, the defendant may plead such fraudulent assignment and set off a demand against the payee.

ERROR to Lewis Circuit Court.

GREEN & STRINGFELLOW, for Plaintiff, insist:

That the Court erred in sustaining the demurrer—the plea of set off being an equitable defence, and the party to the suit *beneficially interested*, being indebted to the defendant, the defence may be made. 13 Johns. Rep. 9; 8 ib. 152; 3 Johns. Cas. 425, 263; 1 do. 51; 8 Pick. 342; 5 ib. 167; 16 Mass. Rep. 473.

GLOVER & CAMPBELL, for Defendant, insist:

That the opinion of the Circuit Court was correct:

- 1st. Because the matter in said plea contained, was not well pleaded.
- 2d. Because the matter attempted to be pleaded was not a bar to the plaintiff's action. Rev. C. 1845, p. 190, §3; 4 Mo. R. 450; 7 Mo. R. 402.

McBRIDE, J., delivered the opinion of the Court.

On the 21st November, 1842, John Baker executed his note for \$58 52, to Asher B. Owsley, payable twelve months after date, for value received, without defalcation, bearing ten per cent. interest from date. On the back of said note is the endorsement, "for value received I assign the within note to Samuel Brown. Nov. 19, 1843. A. B. Owsley."

An action of petition in debt was instituted on the note, in the name of

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*Baker vs. Brown, assignee, &c.*

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Brown, the assignee, for the use and benefit of Jona Franklin, against the obligor.

At the May term of the Lewis Circuit Court, 1846, the defendant Brown appeared, and filed two pleas to the action—first, *nil debet*—second, *set off*. The plaintiff, passing by the first plea of the defendant, filed his demurrer to the second plea, which being sustained by the Circuit Court, he had his judgment, and the defendant, after having failed in obtaining redress in the Circuit Court, has brought his case here by writ of error.

The only question which the plaintiff in error presents for our consideration, is the judgment of the Circuit Court on the demurrer to his plea of set off.

The plea in substance, sets out that the plaintiff in the action is not the legal owner of the note, nor has he any interest therein. That the note was fraudulently assigned by Owsley, to prevent the defendant from obtaining an off set for produce sold and delivered by him to Owsley, prior to the date of the assignment. The plea is lengthy, and the facts pleaded appear to be well pleaded, so far as we can discover. Do they then constitute a bar to the action?

To sustain the judgment of the Circuit Court, we are referred to our statute concerning bonds and notes. Rev. C. 1845, p. 190. The second section authorizes the assignment of all bonds and notes for the payment of money or property, and gives the assignee the right of action in his own name for the recovery of so much thereof as shall appear to have been due at the time of the assignment. Under the provisions of this section no question could reasonably arise as to the defendant's right to set off any indebtedness from the plaintiff to him, existing prior and at the date of the assignment. But, as if to avoid all possible misconception, the next section declares that "the obligor or maker shall be allowed every just set off and discount against the assignee or assignor, before assignment, *unless* it shall be expressed in the bond or note that the sum therein specified shall be paid without defalcation or discount."

The note sued on in this case contains the words "without defalcation," and is supposed, therefore, not to come within the operation of the second section.

Questions have heretofore been presented under this section of the act to this Court, and some adjudications have been had, but it is believed that the question now presented has not heretofore received the consideration of the Court, nor does it come within the principle of any case decided.

If the note now sued on was in the hands of Owsley, the payee, the

*Broadwell & Dyer vs. Yantis.*

payor, Baker, would have a right to his set off for any indebtedness of Owsley to him, regardless of the words "without defalcation." And such is the fair interpretation of the statute, having reference and providing expressly for instruments in the hands of *assignees*, and not where the action is between the original parties to the instrument. The object of the statute appears to have been to give somewhat of a mercantile character to bonds and notes, and protect assignees, when the maker will insert in the body of the bond or note, executed by him, that he will pay it to the legal owner "without defalcation."

If Baker would have been entitled to his set off, in any action brought by Owsley, notwithstanding the expression "without defalcation," and could only be defeated by an assignment of Owsley, then we can see no propriety in refusing to let Baker show or establish the fact that although there be an assignment, in form, from Owsley to Brown, yet the legal title to the note is and remains in Owsley, so far as his right to his set off is involved, the note having been fraudulently assigned. It surely cannot be seriously contended that a fraudulent assignment of a note by the obligee, can in any wise affect the right of the obligor to any and every legal defence to which he was before entitled. The recognition of such a principle would lead to irreparable wrong.

The demurrer to the plea should have been overruled by the Circuit Court, and not having been so done, the judgment of the Court is reversed, and the cause remanded for further proceedings in that Court.

**BROADWELL & DYER vs. YANTIS.**

1. A. having purchased a tract of land, gets a bond for title upon payment of the purchase money. He then sells his right and transfers the title bond to B. Held—That A. has no interest in the land which is subject to execution.
2. The purchase money being unpaid, the lien of the vendor can not be enforced by a suit *in personam* against A., nor can any interest in the land be sold under an execution in such suit. The purchaser can only enforce his lien in equity.
3. A purchaser from one having only a title bond to a tract of land, will occupy the same position as his vendor, and will be bound by all notice and equities affecting him.



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*Broadwell & Dyer vs. Yantis.*

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## APPEAL from Callaway Circuit Court.

ANSELL & KIRTLEY *for Appellants.*TODD & LEONARD, *for Appellee, insist:*

1st. That the bill should be dismissed for these reasons: *First*—The prayers are multifarious and inconsistent, and cannot be united in the same bill. 9 Mo. R. 293. *Second*—The complainants ask a performance, and do not proffer or tender payment of the purchase money due for the lot.

2nd. That the vendor, Leiper, had a lien upon the estate sold to Nolly for the purchase money unpaid. See 2 Sugden on Vendors, 62. A bond or note taken for purchase money will not affect the lien. Ibid, 67. So the lien continues to the assignee of the debt.

3rd. The purchasers (the complainants,) of the equitable title must always abide by the case or the person from whom he buys, and will be entitled to all the remedies of the seller. See 2 do. 303—4. 7 Mo. R. 524, Barton's adm'r vs. Rector, &c. 8 Mo. R. 374, Durrett's vs. Hook.

4th. A purchaser with notice is in equity bound to the same extent and in the same manner as the person was of whom he purchased. 2 Sug. 307.

5th. The complainants must, before performance is required of debt on the title bond, aver and show performance of Nolly's obligation to pay the purchase money to Leeper for the purchase of him. 1 Sugden, 291—2—3, 296—note 159.

6th. The complainants cannot obtain a rescission of the contract when the fault for non-performance is upon them.

7th. They cannot procure damages in chancery upon the prayer exclusively for damages, but must sue at law.

NAPTON, J., *delivered the opinion of the Court.*

This was a bill in chancery brought by Broadwell & Dyer in the Circuit Court of Callaway County against John L. Yantis. The facts alleged in the bill as the ground of the complaint are as follows:—

Tate & Nolly (a mercantile firm in Fulton,) being in possession of two lots in that town, numbered 177 and 178, which they had purchased of one Leiper, for \$1050, and upon which purchase there was a balance due said Leiper of about \$600, exchanged them with John L. Yantis for four lots then in his occupancy numbered 179, 180, 181 and 182, giving said Yantis, as the estimated difference in the value of the two blocks, \$150. These last named lots had been bought by Yantis of one Hockaday for \$1100, and at the time of the exchange a considerable portion of the purchase money was still due from Yantis to Hockaday. Both Yantis and Hockaday were aware of the incumbrances upon the lots at the time of the exchange. This exchange was made on the 22nd August, 1840, and Nolly being put in possession of the four lots, (originally belonging to Hockaday,) received from Yantis his title bond acknowledg-

*Broadwell & Dyer vs. Yantis.*

ing the receipt of \$1200, and agreeing to convey at the expiration of twelve months from the date of the bond.

On the 15th September, 1842, this title bond of Yantis for the four lots agreed to be conveyed to Nolly, was assigned by Tate & Nolly to the complainants Dyer & Broadwell, to secure them as endorsers of a note in bank given by the firm of Tate, Nolly & Cook; thereupon the said Dyer & Broadwell, as the bill asserts, took possession of these lots and immediately leased them to Nolly for a year. This was in October, 1842.

Yantis in the meantime having received immediate possession of the two lots which he received from Nolly, being the same which had originally belonged to Leiper, and upon which Leiper still had a lien for a part of the purchase money, sold them to Asa Farrar for \$1000. After this transfer to Farrar, Nolly's notes to Leiper which had been assigned to one Henderson, was put in suit by Henderson; judgment being obtained against Nolly, the execution was levied upon the two lots sold to Farrar, and then in Farrar's possession, and the lots were sold in January, 1843, Yantis becoming the purchaser for about \$500. Yantis obtained a deed from the Sheriff.

Previously to this, in December, 1842, Yantis having paid up the balance of the purchase money due to Hockaday, obtained a deed for the four lots which in the exchange between him and Nolly were to have been conveyed to Nolly. In October, 1843, he commenced an action of ejectment against Nolly, who was in possession as tenant under the complainants Dyer & Broadwell, and in 1845, obtained a judgment.

Upon this state of facts the bill prays, first, that the complainants may be substituted to Nolly's rights against Yantis; second, for a rescission of the contract between Yantis and Nolly, and a conveyance of the two lots bought in at the sale under Henderson's execution, and a return of the \$150, with interest received of Nolly; or, third, if Yantis retains the \$150, that complainants upon paying to Yantis the remainder of the \$500 paid by him on Henderson's execution, shall have a conveyance of the two lots; or, fourth, if the Court shall consider Yantis's transfer to Farrar as precluding a re-conveyance of these two lots, then that Yantis pay complainants the \$1000 received of Farrar as the purchase money for said lots, and the \$150 obtained from Nolly on the exchange; or, fifth, that the Court decree a sale of Yantis's lots which he bought of Hockaday to reimburse the complainants as securities as aforesaid for Tate & Nolly; and lastly, for general relief.

The answer of Yantis admits all the principal facts, as stated in the bill, and states as an additional fact, that the complainants knew of the sale under Henderson's judgment, but refused to purchase at said

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*Broadwell & Dyer vs. Yantis.*

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sale. This statement is corroborated by the proofs taken in the cause.

A general replication was filed, and on the final hearing the bill was dismissed with costs; a motion for a re-hearing was made and overruled, and the complainants filed a bill of exceptions. The case is brought to this Court by appeal.

Amidst the various modes of relief suggested by the prayer of the complainants, there are several which seem to be based upon the position that they do not occupy the same ground which Nolly, their assignor would do, and that the lien of Leiper for the purchase money due by Nolly does not affect their rights as assignees of Yantis's title bond without any knowledge of such unextinguished lien. This position has been assumed in the bill and contended for at the bar, and may as well be noticed here as preliminary to any further examination of the subject; for it is manifest that if this ground be maintainable, the complainants are entitled to a conveyance of the block of ground for which they hold the title bond of Yantis, without being affected by any of those equitable considerations which would operate upon Nolly.

That our statute regulating the assignment of bonds and notes for the payment of money or property has no application to such bonds as the one transferred to the complainants may be readily conceded. This act was designed to restore the common law in regulating bonds and notes of a certain description, and to prevent their confusion with commercial paper which had become entangled by technical rules not understood by the great mass of the community. By the common law the assignee of a chose in action stood in the same condition as the person from whom he purchased: he acquired no additional rights or privileges by the assignment. To subserve the interest of commerce, the law merchant modified this rule; the question of notice arose, and a variety of others, upon which the rights of the holders of negotiable paper depended, and the endorsee became subject to different rules from those which regulated the assignee at common law. A bond or covenant to convey land, we presume, is unaffected by the statute, and the assignees of such a bond can occupy no other or better ground than the person from whom they purchased. They are merely the equitable owners of the bond, and if they institute a suit at law for a breach of the covenant they must sue in the name of the assignor, and when they come into a Court of Chancery they can only ask to be substituted to the rights of the assignor.

The question of notice does not arise in this case. A lien exists in favor of the vendor of land for the purchase money whether a title be

*Broadwell & Dyer vs. Yantis.*

made or not; but when the title has been made, the lien may not reach a *bona fide* purchaser without notice. A title bond, however, is of itself sufficient to put a purchaser upon enquiry, and he is presumed to be cognizant of the reasons which induce the vendor to withhold the title. It is not material, therefore, whether the complainants, when they purchased the title bond of Yantis, knew of the incumbrance of Leiper upon the lots which constituted the consideration of that bond; they must take the obligation of Yantis subject to all the equities existing against Nolly, from whom they purchased.

Assuming, then, that the complainants occupy the same position in a Court of equity which Nolly, from whom they purchased, would have occupied, it is obvious that the principal question upon which the equitable rights of these parties must depend, grows out of the character and effect of the purchase made by Yantis under Henderson's execution. If Yantis by that purchase acquired a valid, legal title, independent of the equitable interest which he had previously procured from Nolly, by virtue of the exchange between him and Nolly, it must follow that neither Nolly or his assignees can expect to derive any benefit from that purchase. Viewing it in that light it would be a mere speculation outside of the contract between Nolly and Yantis, and a Court of equity would not interfere, whether the speculation proved a profitable or losing adventure. But if on the other hand the sale under Henderson's execution was a nullity, and the Sheriff's deed passed no title, a Court of equity would regard the extinguishment of Leiper's incumbrance as accruing to the benefit of the parties equitably entitled to the land, in whatever proportion that equitable interest might exist.

What interest then had Nolly in these lots derived originally from Leiper at the time Henderson's execution was levied upon them? It seems that Leiper held Nolly's notes for a balance due upon his purchase of the lots for about \$400, and that he transferred these notes to Henderson. Henderson brought suit upon the notes, recovered a judgment against Nolly, and sued out an execution, which he caused to be levied upon these lots, then in the possession of Farrar. Previous to the levy, and indeed before the judgment of Henderson, Nolly had sold his equitable title to Yantis, and Yantis had transferred it to Farrar, so that at the time these lots were levied on, Nolly had neither possession nor any interest, either equitable nor legal, unless it be that remote equity which depended on the contingency of a rescission of the contract between himself and Yantis. In the case of *Bogart vs. Perry*, (1 Johns. Ch. R.

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51,) the chancellor held that a mere naked equity could not be reached by an execution. There must be an interest in land which a Court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution. A mere equity unaccompanied with possession is not such an interest. The Sheriff's deed passes all the estate and interest which the *debtor* had or might lawfully part with in the lands at the time the judgment was obtained. Nolly was the debtor in the present instance, and when Henderson's judgment was obtained, Nolly had sold his equitable interest in the land to Yantis, and had parted with the possession. Suppose a stranger had been the purchaser instead of Yantis—what sort of title would he have acquired by the purchase? Could he have asserted or maintained his possession in a Court of law, divested of the equitable rights of Yantis or the person who purchased of Yantis? If the judgment obtained by Henderson was a lien upon these lots, or rather upon Nolly's supposed interest in these lots, it must follow that a judgment by any other creditor would have had the same effect. This would lead to the manifest absurdity of suffering the lien of the vendor to be extinguished by a proceeding to which he would be an utter stranger, and in the benefits of which he could not participate.

These considerations show most conclusively, in our opinion, that a vendor cannot enforce his lien upon land which has passed from the possession of his vendee, by a suit *in personam* against the vendee, upon the notes given for the purchase money. The rights of the parties cannot be adjusted without a resort to a Court of equity. The course pursued in the present instance would be liable to all the objections noticed by this Court, in the case of a mortgagee who attempts to cut off the equity of redemption by a sale, under a judgment obtained against the mortgagor, upon the debt for which the mortgage was a security. Yantis cannot set up an independent title under the sheriff's deed. So far as the title to these lots is concerned, that transaction did not affect it. By means of it, Leiper obtained his purchase money; his lien was extinguished, and he held a bare legal title, subject to be transferred by a Court of equity to the equitable owner. Yantis would unquestionably be considered the equitable owner, not, however, merely because of his payment of five hundred dollars to the sheriff, and the consequent virtual extinguishment of the lien of Leiper, but because he also had previously acquired from Nolly his equitable title, and becoming in this way the owner of the *whole* equitable title, with only a naked legal title outstanding in Leiper, he would be entitled in a Court of equity to be regarded as both the legal and equitable owner of these lots. It is the interest acquired



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by the contract with Nolly, then, which enables Yantis to acquire an unincumbered title. Without this interest his title would be of no avail, either in law or equity.

We shall assume, then, without further argument upon this branch of the subject, that the title which Yantis acquired to the *Leiper lots*, grew out of the contract between him and Nolly. The sale of those lots to Farrar, and the purchase of the outstanding incumbrance, must be regarded as an affirmance of that contract. It is true, that Yantis subsequently brought an action of ejectment upon his legal title to the block of ground conveyed to him by Hockaday, and ousted Nolly from the possession of that block; but this did not extinguish the equitable interest of Nolly. Yantis could not blow hot and cold with the same breath. He could not avail himself of the contract with Nolly, to acquire a complete title to the block of ground originally belonging to Leiper, and at the same time repudiate that contract by resuming possession of the block he had purchased of Hockaday, and had contracted to convey to Nolly. Had his title to the Leiper lots been acquired independently of his contract with Nolly, he might have rescinded that contract in consequence of Nolly's failure to comply with its terms. But this we have seen, was evidently a misapprehension, on his part, and seems to have misled him in the course he subsequently pursued. A Court of equity would not permit him to retain both blocks of ground, and the one hundred and fifty dollars which he received from Nolly, on the contract of exchange, free from all equitable title in Nolly, or Nolly's assignees, nor would it be equitable to permit Yantis to suffer any pecuniary loss by his purchase of the incumbrance of Leiper. That purchase appears to have been occasioned by a laudible solicitude on the part of Yantis, to comply with his contract with Farrar. We, however, must regard that contract with Farrar as a virtual affirmance of the previous contract with Nolly, as it was made with a full knowledge of the outstanding legal title of Leiper. Nolly's assignees are consequently entitled to the benefit of that contract, and may have the title to the four lots purchased from Hockaday, upon reimbursing Yantis for his expenses in procuring the legal title to the lots purchased from Leiper. We shall, therefore, direct a decree for a sale of the lots numbered 179, 180, 181, and 182, and that from the proceeds of the sale there shall be paid to John L. Yantis, the amount which he paid on the execution in favor of Henderson, with interest at the rate of six per cent, from the time of payment, he accounting for the rents and profits of the lots, and the remainder to be paid to the complainants. As the time, place and terms of sale may be more satisfactorily determined in

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*Buckham & Kibbe vs. Singleton, adm'r. of Kibbe.*

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the Circuit Court, the judgment of that Court is reversed, and the cause remanded.

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BUCKHAM & KIBBE vs. SINGLETON, ADM'R. OF KIBBE.

A note given by a surviving partner to the administrator of a deceased partner, who had administered upon the effects of the partnership, is valid, even though such settlement may not have been in accordance with the law concerning such administrators.

APPEAL from Andrew Circuit Court.

NAPTON, J., *delivered the opinion of the Court.*

Singleton, the adm'r. of Stephen W. Kibbe, deceased, brought suit upon a note given by the appellants for \$430 50. Defendants pleaded nil debit; that the note was obtained by fraud, covin and misrepresentation; and thirdly, that it was procured by menaces and threats of injury to the business of said defendants. The third plea was demurred to and the demurrer sustained. Issue was taken and tried upon the remaining pleas.

The plaintiff gave in evidence his letters of administration and the note sued on. The defendants introduced witnesses whose testimony was designed to show that the note was given as a settlement of the partnership concern which had existed between Buckham and plaintiff's intestate, and that the note embraced the amount which said Kibbe, deceased, had put into the concern. It appeared that Stephen W. Kibbe, just before his death, sent for the defendant Buckham, and requested him to pay over to one Newman the amount of his debt, ( \$450 ) and if any thing was left to give it to his children; that he was willing for Buckham to leave the store house in which they had done business, provided he (Buckham) would pay for the nails and lumber. This Buckham promised to do if it would suit. It appeared that the \$450 borrowed of Newman had been borrowed for the partnership concern, by said Kibbe.

There was no evidence tending to show any fraud or misrepresentation about the matter. Several instructions were asked of the Circuit Court, the substance of which was that if it appeared that Singleton had not

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*Merle & Co. vs. Hascall.*

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pursued the provision of the administration law, in relation to the settlement of partnership concerns, which are to be found in the first article of said act, but had in fact made a *lumping* settlement with said Kibbe, that the note was void and that the plaintiff could not recover. These instructions were refused, and the plaintiff had a verdict and judgment for the amount of the note. We are of opinion that the Circuit Court properly refused to give the instructions which the defendants asked. The note sued on was voluntarily given to a legally constituted administrator. Whether the administrator pursued the provisions of the administration law is a matter about which the defendants have no right to complain. Indeed the provisions of the act to which allusion has been made, were not, we apprehend, designed to prevent a settlement in other modes which the administrator, under the sanction of the County Court, might think equally advantageous and less expensive to the estate. All the Court concurring, the judgment is affirmed.

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MERLE & CO. vs. HASCALL.

A count charging a factor "with *not selling for the best price*" is not sustained by evidence of a delay in selling, the price obtained being the *best* to be had at the time of sale. The delay in selling should be alleged as the ground of recovery.

ERROR to Ralls Circuit Court.

McBRIDE, J. *delivered the opinion of the Court.*

Hascall commenced his action in assumpsit by attachment against J. A. Merle & Co., in the Ralls Circuit Court to the June term, 1843. The declaration contains several counts. The first being the one upon which a recovery is sought, avers that the defendants "were trading and doing business as general factors, agents or commission merchants, in the sale of goods, wares, merchandize, &c., for a certain commission, percentage or reward, and thereupon, afterwards, on the 13th November, 1838, at New Orleans, that is to say, at the county of Ralls aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, had employed the said defendants as his factors or agents, to sell and dispose of 100 barrels of superfine flour, of great value,

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*Merle & Co. vs. Hascall.*

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to wit, of the value of \$500 for a certain commission, reward or percentage thereon, to be therefor paid to the said defendants by the said plaintiff, they, the said defendants, undertook, and then and there faithfully promised the said plaintiff to sell and dispose of the 100 barrels of flour and said horses, at and for the best prices and advantageous terms for the said plaintiff that they, the said defendants, could get and procure for the same; and although the said defendants afterwards, that is to say on the 25th day of November, 1838, at the county aforesaid, sold and disposed of the said flour and pair of horses, yet did not sell and dispose of the same at the best prices and upon the most advantageous terms for the said plaintiff that they, said defendants, could get and procure for the same according to the said promise and undertaking, but omitted and neglected to do so, and disposed and sold the said flour and pair of horses at much less than they might and could have got and procured for the same, that is to say, &c.

The defendants filed their plea of *non assumpsit*, and neither party requiring a jury, the issue was submitted to the Court, when the Court found for the plaintiff and assessed his damages to the sum of \$297. Thereupon the defendants moved in arrest and for a new trial, assigning their reasons therefor, which being overruled they excepted and now bring the case here by writ of error, and seek the reversal of the judgment of the Circuit Court.

We are aware of the repeated decisions of this court showing a very decided disinclination to interrupt the verdict of a jury where the whole case has been submitted to a jury, or the judge sitting as a jury, and no question of law has been presented to or passed upon by the court. A finding, under such circumstances, affords to this court no certain light to guide them in an attempted review of the action of the jury, as we are not advised whether the verdict was the result of a misconception of the evidence or a misapplication of the law to the evidence, or a misapprehension of the law governing the case. In either of the two former cases the law has wisely vested the power in the circuit judge to correct the error by granting to the party aggrieved a new trial.

The case now before us, we think, is clearly distinguishable from the cases referred to as having been decided by the court, as will be shown by an examination of the declaration and the evidence adduced upon the trial.

The sixth reason assigned in the defendant's motion for a new trial, is the only one which we propose now to examine, and is in the following words: "6th. The evidence does not support the declaration."

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*Merle & Co. vs. Huscall.*

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The evidence introduced upon the trial conduces to show that about the time of the arrival of the plaintiff's flour at New Orleans, flour was worth from twelve to sixteen dollars per barrel, owing to the scanty supply in market and the low stage of the water in the rivers; that about this time it commenced falling rapidly, at the rate perhaps of two dollars per day, owing to the rise in the rivers and the large quantity which was being daily received, until it went down to five or six dollars per bushel. The boat upon which this flour was transported reached New Orleans on the 15th November, 1838, and under the regulations of the city, it must be received within two days after its arrival by the consignee. On the 25th of the same month it was sold by the defendants at \$8 per bushel, that being the current price at the time.

It was also in evidence that such fluctuations in price are not unusual in the New Orleans market; that the house of the defendants stood very high for integrity in their dealings and for business capacity; that many other houses kept flour on hand for a longer period, hoping and looking forward for an upward tendency in the price; that the New Orleans price current shows that on the 24th November, 1838, flour was quoted at \$8 to \$8 25 per barrel, and the latter sum could only be obtained for "bakers brands," and the flour of the plaintiff was not of that description.

This being the evidence, it is manifest that if the plaintiff has sustained any injury by the acts of the defendants, it arose from the neglect or omission of the defendants in not selling the flour at an earlier day. For the evidence is that at the time the sale took place the price obtained was the current price in the market, except for another description of flour which answered some particular purpose better than the flour in controversy. The verdict, therefore, could not have been found against the defendant for not selling for the best price when he did sell.

There is no question but that a factor is not only bound to act in good faith, but he must exercise reasonable diligence in the discharge of the trust confided to him. It is not sufficient that he has been guilty of no fraud, or of no such gross negligence as would carry with it the insignia of fraud, but is required to act with reasonable care and prudence in his employment, and to exercise his judgment after proper enquiries and precautions. Story on Agency, § 186.

A factor who unnecessarily delays selling an article consigned to him for sale is liable to an action for such delay, and equally liable as if he had sold at a less price than the current price in the market at the time of sale of each article. The declaration in such case should aver the delay



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*Merle & Co. vs. Hascall.*

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according to the facts as the ground of the action. But the declaration in this case avers that the defendants did not sell and dispose of the plaintiff's flour at the best prices and upon the most advantageous terms which they could get and procure for the same, but omitted and neglected so to do, and sold and disposed of the said flour at much less than they might and could have got and procured for the same.

The evidence not only does not sustain the averment in the declaration, but positively disproves it, and shows that the best price was obtained at the time the sale was made. A party will not be tolerated in alledging one state of facts, as the ground upon which he seeks a recovery, and proving other and different facts, and having his verdict and judgment. It is a violation of every principle of pleading, and may work the most serious injury to the defendant. It would not only operate as a surprise, but would tend to mislead the party by the statement of facts not intended to be relied upon on the trial, but wholly and entirely different. It would be like suing a party for "work and labor," and proving "money had and received" for the use of the plaintiff.

The object of the declaration is to apprise the defendant of what he is called upon to answer, that he may prepare his pleadings and evidence necessary for his defence. It must alledge truly all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, and this with precision, certainty and clearness, not only that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, but that the jury may be enabled to give a complete verdict upon the issue, and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. 1 Chitty Pl., 285-6.

Wherefore we are of opinion that the evidence did not sustain the first count in the declaration, and for that reason the finding for the plaintiff was wrong, and the Circuit Court should have set aside the finding and granted the defendants a new trial. The judgment of the Circuit Court ought therefore to be reversed; and Judge Napton concurring herein, the judgment is reversed, and the cause remanded to the Circuit Court for a new trial to be had therein.

NAPTON, J.

I regard this case as one of those in which, there being no dispute about the facts, the verdict of the court, acting as a jury, was founded

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*Baldwin vs. Green.*

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on a misapprehension of the law, and should therefore be reversed. Boone County vs. Todd & others, 8 Mo. Rep. 431; Fulkerson vs. Bollinger, 9 Mo. R., 838.

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BALDWIN vs. GREEN.

An act incorporating a town and vesting the authorities of the town with certain powers, does not divest the State or County Courts of powers vested in them by a general law, unless the act of incorporation declares the powers vested in the corporation to be exclusive.

APPEAL from Platte Circuit Court.

McBRIDE, J., *delivered the opinion of the Court.*

Green brought his action before a justice of the peace, against Baldwin, for a failure to work on the road, over which the former was overseer. The case went to the Circuit Court, where Green having obtained judgment, Baldwin appealed to this Court.

The only question presented for the decision of this Court, is whether the act incorporating the town of Platte City, divests the County Court of Platte County of their jurisdiction over that part of the road lying within the corporate limits of said town.

The act of incorporation (Local laws, 1844-5, p. 97, sec. 4,) contains an enumeration of the powers vested in the board of trustees, and among them is the power "to open, establish, widen, extend and repair streets, &c., and to regulate, graduate, pave and improve the streets of said town." If the jurisdiction of the County Court be superseded by the foregoing provisions, it is by implication, for the language does not necessarily operate a suspension of their general control over the subject of roads within the town limits. By a further examination of the enumerated powers, we may collect with certainty what was the intention of the General Assembly, and be enabled consequently to put that construction on the act which was intended. The act further provides that the board of trustees may pass bye-laws "to prohibit gambling and gaming houses; to prevent or restrain the meeting of slaves; to prevent and restrain bawdy houses and other disorderly houses; to levy and collect taxes upon personal and real estate in said town." These are all subjects cognizable by the State Courts and her authorities, and the

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*Renfro vs. Harrison.*

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jurisdiction given to the trustees of said town could not have been intended to divest the Courts of jurisdiction or the State of the right to levy a tax on the property of the inhabitants residing within the corporate limits. And yet, if the construction contended for be correct as to the jurisdiction over the roads, no reason can be found why the property of the inhabitants of a town, made subject to taxation by the trustees, should not be exempt from the payment of a State or county tax. The State Courts would also be powerless "to prohibit gambling and gaming houses," and the morals of the inhabitants be exclusively left in the keeping of the trustees of the town. A statute working such important changes in society should, we think, be strictly construed, and not receive that latitudinous construction contended for by the defendant below, and without which no novel consequences will ensue.

The question involved in this case is subject to the principle settled by this Court, in the case of the State vs. Harrison, 9 Mo. R. 530. Harrison was indicted for keeping a ferry without having obtained license from the County Court; and in defence it was argued that the subject of taxing ferries was given by charter to the corporate authorities of St. Louis; but this Court held that the jurisdiction of the corporation was subordinate, there not being *exclusive* power vested by law in the corporation. So also in the case at bar, the act of incorporation does not vest *exclusive* jurisdiction in the trustees. It does not even create a conflict of jurisdiction between the County Court and the trustees of the town, as both powers may well exist and be exercised by each and both; nor is there any exemption from working the roads in favor of the inhabitants of the corporation, and is different in this respect from the act incorporating the city of Saint Louis, where it is expressly provided that the inhabitants of the city shall not be compelled to work on roads lying out of the city limits.

The judgment of the Circuit Court is affirmed.

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**RENFRO vs. HARRISON.**

The acceptance of a deed by a grantee will not be presumed, unless the grant be certainly to his benefit.

*Renfro vs. Harrison.*

### APPEAL from Callaway Circuit Court.

#### KIRTLEY, for *Appellant*, insists :

1st. That the Circuit Court erred in rejecting the testimony of William Stephens and Joseph Renfro. They are not parties to this suit, and although they will be entitled to further distribution of Absalom Renfro's estate at the death of their mother, from their present attitude they can neither be gainers nor losers in the event of this suit, and have no interest direct and immediate therein. For if the slaves in controversy are found to be Reuben's, it is clear they have no such interest, and if they yet belong to the estate, Reuben has yet to get them, or their equivalent, from the estate. So that as to them it is immaterial whether Reuben has got them or is to get them. Besides, the interest of these witnesses, if they have any, would only be in the use of the record in ascertaining what their interest may be in their father's estate at the death of their mother; and by the 26th section of the Practice Act, page 833, of Missouri Digest, (1845) they are made competent, if incompetent at common law.

2nd. That there was manifest error in letting in Elijah Stephens' statement of the contents of Reuben Renfro's letter to his mother. The letter was the best proof of its own contents. No notice was given to Mrs. Renfro to produce it; no excuse for its absence, and the secondary evidence was without law or reason. 2 Phil. Ev. 549, 553; 3 do. 1210, 1211.

3d. The possession of the slaves in controversy having been and remaining in Mrs. Renfro, the deed of relinquishment, as it is called, of the 5th December, 1843, not conforming to our statute, was a nullity as to Reuben, and ought not to have gone to the jury. Digest of 1845, page 588, article 3rd, of the act concerning slaves.

4th. The first instruction given for plaintiff, (being 2d asked) is as to this case an abstract principle well calculated to mislead the jury, and ought not to have been given. When analysed it explains the rights of all and each of the distributees of the negroes, except Reuben, the only one who is a party to this suit. 1 Mo. Rep. 359, Donohoe vs. Glasgow; 6 Mo. Rep. 6, Nicholas vs. The State.

5th. We shall insist that the remaining instructions given for plaintiff were calculated to mislead the jury and ought not to have been given.

6th. We shall rely that the 1st, 3d and 4th instructions asked by Mrs. Renfro, contained the law applicable to the case, and are abundantly sustained by authority. 2 J. R. 52; 7 J. R. 26; 12 J. R. 188; and lastly, that the Court erred in overruling Mrs. Renfro's motion for a new trial for the reasons set forth in the foregoing propositions.

#### TODD & HARDIN, for *Appellee*, insist :

1st. The deed was properly admitted; it needed no proof or record if possession passed under it, and that fact was properly left to the jury.

2nd. The answer of Reuben M. Renfro, as contained in his letter, was legally admitted. 1. It was in proof of a fact which need not be in writing. 2. It was of a paper which was *functus officio*, and not presumed to be preserved. 3. The objecting party is estopped from denying its contents, having acted under it, and various rights having grown out of the transaction. 4. It is a paper in her own possession and necessarily involved in the evidence, if in being she can disprove by its production the *prima facie* parol evidence given of its contents.

3d. The interpleadant is estopped from denying the declarations of Shelton Renfro at the time of those transactions. 1. She admitted and acted upon his authority. 2. The fact of the statement is a part of the *res gestae*, and could be testified to without producing the said Skelton. 1 Greenleaf's Evid. section 113.

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4. The deed of gift of slaves is valid and legal to Reuben, although absent; his assent is presumed in law, but his assent is fully established and an agency to accept deed. So the possession is direct under the deed to his agent; but possession is sufficient in one grantee of estate in common. The question of an agent having proper authority was fairly found by the jury, and of his possession under the deed.

5. The court will not disturb a verdict when the evidence is full and conclusive as in this case for the verdict.

6. The testimony of Wm. Stephens and Joseph Renfro was properly excluded by the court from the jury. 4 Mo. R. 18, *Foster vs. Nowlin*.

7. The appellant had only a life estate, a temporary interest; and the relinquishment of her interest is not such a gift of slaves as is contemplated by the statute. Dig. 1835, page 588, article 3, sections 1 and 2.

NAPTON, J., *delivered the opinion of the Court.*

This was an action by petition in debt, brought by Crockett Harrison against Reuben M. Renfro, accompanied by an attachment against two slaves, alledged to be the property of said Renfro. There was no personal service of the writ upon Reuben M. Renfro, he not having been in this State for several years; but an order of publication was made. At the return term, Chloe Renfro filed her interpleader in the cause, claiming the attached slaves. Issue was taken and tried, and a verdict found for Harrison. In the course of the trial, the interpleadant took exception to various acts of the Circuit Court. It was proved for the interpleadant that the slaves in controversy were the property of her deceased husband, Absalom Renfro; that by the will of the said Absalom Renfro, these slaves, together with all his other slaves, were bequeathed to said Chloe for life or widowhood; remainder to the children of said Absalom and Chloe in equal shares. It was also proved that said Chloe had been in possession of the slaves attached, ever since the death of her husband.

William Stephens, who had married a daughter of the interpleadant, was offered as a witness to establish the above facts, but was objected to as incompetent, and rejected by the Court. Joseph Renfro, a son, was also rejected on the same ground. Exceptions were taken on this point.

On behalf of Harrison, the defendant in error and plaintiff in the attachment, it was proved that the interpleadant, being anxious to relinquish to her children all interest in fourteen of the slaves left to her by the will of her husband, made known this determination to her children living in the neighborhood. Reuben (the defendant in this suit) had been absent for several years, and Elijah Stephens (a witness) was requested to write



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to him and ascertain whether he was willing to the proposed division. This the witness did, and he also saw the answer which Mrs. R. received, and the answer, as the witness stated, contained his assent to the proposed division of the negroes. This was objected to and an exception taken.

It appeared from the testimony of this same witness, that all the children, except Reuben, were together when the division was actually made. A conveyance, written by the witness, of the interest of Mrs. Renfro, was given in evidence, though it was objected to as not proved in conformity with the statute of 1835 concerning slaves. (Ch. 3. sec. 1.) The division was made on this wise. The witness and two friends called in for the purpose, valued the slaves; they were then put up to the highest bidder, each child having a right to buy to the extent of his share, and if the purchase exceeded that sum, the excess was to be accounted for to those whose bids fell short of their proportion. This witness testified further, that Skelton Renfro, who was present, stated that when he was at Galena, (more than a year before) his brother Reuben had requested him to act for him in the division of the slaves. This testimony was objected to, but admitted. The witness further stated, that Skelton then bid in the two slaves in controversy for Reuben, it being the highest bid, and exceeding the share he was entitled to about as much as one Ridgeway's fell short. Accordingly Ridgeway proposed that he would retain possession of the slaves until the difference was paid, but the old lady objected and said she would keep them herself until Reuben came for them. They thus remained in her possession until attached.

The Court instructed the jury, among other things: 1. That if the deed of relinquishment was executed by Chloe Renfro, and if in pursuance of it she permitted the children or any of them to take possession of the slaves, and have them valued and sold for division, such acts are evidence of actual delivery of possession to such children. 2. That the deed of relinquishment, being a beneficial gift, the law presumes that each of the parties accepted it, although ignorant of the deed, unless a dissent is proved. 3. If the parties interested in the slaves admitted the acts of Skelton Renfro, as agent for Reuben, and Chloe Renfro assented by her acts to his so acting, she cannot now deny that agency. Such an agency need not be proved in writing, but a parol power is sufficient in law to authorize the agent to act. 4. That if they find a delivery up of any of the negroes to any of the grantees by Mrs. R., such delivery is good against her as a delivery to all the grantees of the deed.

Several points have been presented in this case, a portion of which

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only it will be necessary to investigate. The prominent error in this case, is the opinion entertained by the Circuit Court that the assent of Reuben Renfro to the division of the slaves made in his absence might be presumed, upon the principle that every man may be supposed willing to accept a beneficial grant. If we could see certainly that the relinquishment of the life estate of his mother would, under all circumstances, be beneficial to Reuben, there could be no objections to the instruction given by the Circuit Court on this head, or to the several other instructions which grew out of this proposition. But it is quite obvious that this particular division of these slaves might be altogether unsatisfactory to Reuben, who had a vested remainder in a certain share or proportion of them of which he could not be deprived. The value of the life estate of Mrs. Renfro, and the price at which the slaves were apportioned to him, would be circumstances likely to effect his determination in acceding to or dissenting from the proposed deed. The second instruction, therefore, put the case to the jury upon the ground that no assent of Reuben's to the deed of Mrs. Renfro, and of course that no delivery of the negroes to Reuben in accordance with the deed was necessary to be proved. It is true that an attempt was made to prove a delivery of the slaves attached to the agent of Reuben, or at least the assent of Reuben by his agent, to the division that was made, but the testimony was clearly illegal. Had the agency of Skelton Renfro been proved, his acts and declarations, so far as they were within the scope of his agency, might have been given in evidence against Reuben M. Renfro. But the only proof of the agency was the declaration of Skelton testified to by Elijah Stephens, which was merely hearsay evidence.

The case then stands without any legal proof of the assent of Reuben to the deed of gift or of any delivery to him or his authorised agent. It must follow, if this be the actual state of the facts, that the interest of Reuben never passed from the interpleadant, whatever effect may be given to the deed, so far as the other children were concerned.

The exclusion of the two witnesses, the son and son-in-law of Chloe Renfro, has been made a point in the argument for the reversal of the judgment. Whether the Court decided right or wrongly on this point cannot be of any consequence, as the same facts proposed to be proved by these witnesses were proved by another witness to whom no objections were made, and those facts moreover appear not to have been contested in the case. Under these circumstances it would be useless to enter into any investigation of the competency of these witnesses.

The other Judges concurring, the judgment is reversed and cause remanded.

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*Cochran vs. Moss.*

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COCHRAN vs. MOSS.

Where issues are made by order of a chancellor under our statute, the finding of the jury on such issue is conclusive on the chancellor, on the hearing of the bill, unless such finding be set aside by the Court.

APPEAL from Shelby Circuit Court.

**ANDERSON & DRYDEN, for Appellant, insist :**

That the evidence establishes unequivocally the fact that he was prevented from appealing to the Circuit Court by the act and agreement of defendant. The verdict of the jury shows that the judgment against him on said note is iniquitous and unjust. That defendant ought not upon principles of justice and equity, to prevent the attainment of justice on the part of complainant by a flagrant violation of his own agreement, and coercion from him a pretended debt concocted and established by a series of fraudulent and infamous acts.

**STRINGFELLOW, GLOVER & CAMPBELL, for Appellee, insist :**

That the decree of the Circuit Court should be affirmed.

*First.* Because the issue upon the execution of the note having been directed by an interlocutory order in the cause, the finding thereon was not conclusive at all upon the parties, and it was competent for the Court to proceed to hear and adjudge the whole cause upon the bill and answer again, as was done in this instance. See 2nd Smith, Chy. Prac. p. (note a) citing 4 Myl. and Cr. See Equity Draftsman, 487.

*Second.* The record shows that the cause was set for hearing on the bill and answer, and was heard on the bill and answer, and though a replication appears to have been filed, yet, as no exception was taken, it must be presumed that it was withdrawn, and all the averments in the answer must be taken as true. See Rev. Code, 1835, page 310, sec. 18, 19.

*Third.* But conceding that the verdict was not to be controverted, and was to be regarded as conclusive as far as it went, the balance of the cause being reserved for further directions, as to the other matters of equity contained in the bill, the Circuit Court was compelled in adjudication of those matters, to dismiss the bill, the proofs not being sufficient to sustain them. 2 Smith's Chy. Pr. 81; 1 Bibb, 175; 2 Littell, 271; 2 Bibb, 326.

*Fourth.* Conceding the verdict at law was not to be controverted, the defendant certainly had the right to show that the issue or finding was immaterial to the relief prayed by the bill, as was the fact here, the jury having found that the promissory note in issue before them, was not "a deed," such a verdict was a positive nullity in the cause. 2 Tidd's Prac. 953.

*Fifth.* It seems that no affidavit was filed before the justice by Cochran, putting in issue the execution of the note. Had he, therefore, taken his appeal, he could not have made this point in the Circuit Court. Rev. Code 1845, p. 371, § 16.

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*Cochran vs. Moss.*

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McBRIDE, J., *delivered the opinion of the Court.*

Samuel Cochran exhibited his bill in chancery to the Shelby Circuit Court against John Moss, and obtained an injunction to stay the collection of a judgment obtained before a justice of the peace by Moss against him. The bill sets out the judgment, denies indebtedness, and alleges that before the expiration of the time for taking an appeal from said judgment, Moss agreed to arbitrate the matters in controversy between them, but that after the lapse of the time fortaking said appeal, he refused to arbitrate, and was about proceeding to enforce the collection of the judgment by execution.

The answer denies all the material averments in the bill, and prays that the injunction may be dissolved and the bill dismissed. To the answer a general replication was filed.

Under the provisions of the 6th sec. 3rd art. of the act to regulate the practice in Courts of Chancery, R. C. 844, the Court directed an issue to be made and tried by a jury; whereupon the complainant filed his plea of *non est factum* with affidavit, and issue being taken thereon, and the evidence of the parties submitted to a jury, the jury found for the complainant, the issue aforesaid. The defendant filed his motion for a new trial, assigning the usual reasons, which was by the Court overruled.

The cause was set down for hearing on the bill, answer, exhibits and evidence, when the Court decreed a dissolution of the injunction and a dismissal of the bill. The complainant moved for a new trial, &c., which being overruled by the Court, he excepted and appealed to this Court.

The first question presented for our decision, is whether the chancellor, after the finding of an issue by the verdict of a jury, can disregard that finding and decree against it.

Under the English chancery practice he unquestionably has that right, and it is of every days occurrence to do so. There the chancery and common law Courts are entirely separate and distinct tribunals, and when the chancellor desires an issue to be tried at law, he sends the parties into the Court of common law, where issues are framed and tried and the result certified to him. But such is not the case in this State; for here the same judge presides over both Courts, and the making of issues for trial by a jury is now regulated exclusively by statutory enactment. If we be right in supposing that the trial of issues at law in a chancery cause is controlled by the statute, then we must look to the provisions of the statute, and not to the practice in the English Courts, to ascertain

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*Cochran vs. Moss.*

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what are the powers rightfully to be exercised by our Courts of Chancery on the subject under consideration.

The sixth section of the act before referred to, declares that "if at any time during the progress of a cause it shall, in the opinion of the Court, become necessary to determine any fact in controversy by the verdict of a jury, the Court may direct an issue, or issues, to be made." The next section provides, "that no issue shall be made except such as shall be directed by the Court." Section 8 declares, that "the trial of such issues shall be by jury, and the issues shall be disposed of by a general or special verdict before a final decree shall be made therein." § 9. "The Court may award a new trial of any issue upon good cause shown, but not more than one new trial of the same issue shall be granted to any one party."

These provisions in the statute appear to cover the whole subject of the making of issues for trial at law, their trial, and the control which the judge can legitimately exercise over them. The judge must first find it necessary to try the fact in controversy by a jury; he then directs the issue to be made, and no other can be made except such as he directs; he cannot decree until after the issues have been disposed of by the jury; he may so far control the finding of the jury as to grant one new trial, but no more. If after the foregoing proceedings are had directly under the supervision of the Court, there is no obligatory effect in them, but the chancellor may discharge the jury and proceed to decree directly in conflict with the verdict, then it would appear useless to subject the parties to the delay and costs incident to the trial of issues by a jury, and the chancellor should be left to decide the whole matter in controversy. Such, we are persuaded, is not a fair and rational construction of the statute; such was undoubtedly not the intention of the Legislature.

This question has before occupied the attention of this Court, (4 Mo. Rep. 457,) where the Court say, that under our statute regulating the trial of issues in a Court of Chancery, that Court is put upon the same footing as a Court at Law. In the same book, page 504, where the issue in a chancery cause was tried by the judge sitting as a jury, the Court say, "had the issues in this case been found by a jury, it is plain that the Circuit Court would have been bound by the terms of the act to decree on such finding; for by the 6th sec. of the 3rd art. of the act to regulate, the practice in Courts of Chancery above referred to, it is provided that the Court may award a new trial of any issue upon good cause shown, but no more than one new trial of the same issue shall be granted to any



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one party, and the jury having found the issues, the party against whom the finding is must not apply to the Court to dismiss the bill for defect of evidence, the jury having found that there is no defect of evidence, but he must ask for a new trial of the issues."

The plea filed on which the issue was made, was the plea of *non est factum*, and the jury by their verdict declare that the note upon which the judgment was obtained in the Justices' Court, and to restrain the collection of which the injunction was granted, was not the note of the complainant; yet the Chancellor, on a hearing of the cause, dissolved the injunction and dismissed the bill. In doing this we think he committed error, as his only means of correcting the finding of the jury, if wrong, was by granting the party a new trial. If the verdict was permitted to stand, the decree should have perpetuated the injunction, unless the allegations in the bill were wholly untrue and disproved.

We are next to enquire whether the Circuit Court committed error in dissolving the injunctions and dismissing the bill of the complainant. The bill is one filed for the purpose of obtaining an injunction to stay the collection of a judgment at law, and the averments contained therein, are therefore verified by the oath of the complainant. Those averments or statements setting forth the equitable grounds of relief, are denied by the answer of the defendant, likewise made under oath. To support the statements contained in the bill, the complainant read the deposition of B. W. Foley, who testified as follows:

"When I resided in Missouri, which was from or about the 7th day of November, 1840, until sometime in May, 1843, and my impression is that some time in the winter of 1842 or 1843, the parties to this suit had some difficulty about two notes which defendant Moss held on complainant Cochran, suit was brought by defendant against complainant on said notes before some justice in Shelby county, as I distinctly understood from both the parties. I also learned from both the parties, that Moss had recovered judgment on both of said notes, and I am strongly impressed with the belief that one or two days after said judgments were rendered, Cochran, the complainant, came to my father's and made some enquiries as to the best course for him to pursue in order to avoid the payment of said notes or judgments. Such advice as I thought proper I gave him, and he, Cochran, left for home. Shortly after he left, and on the same day Moss came in, and the subject came up in relation to said judgments. Moss then said, that if the old man was dissatisfied, meaning the complainant, he, Moss, was willing, and indeed desirous, that the matters should be arbitrated or settled by any two respectable and disinterested

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men, as he did not want any thing off the old man ; and he further stated that he was willing that the books containing his accounts might be taken and examined, and the settlement made by them. I further state, that I heard both of the parties to this suit say that they were desirous, and had agreed to arbitrate the matters of difference pertaining to the two notes before alluded to, and Cochran came once or twice, or perhaps oftener, and said that he could not get Moss to fix a time for said arbitration, and asked me, if in the event that Moss postponed setting a day within the proper time for taking an appeal, what remedy he, Cochran, would have. I told him he could enjoin him, I had no doubt, by a proceeding in chancery, when the whole facts would come out as to the execution of the notes.

"It would be well probably here to state, that with reference to what Moss said one or two days after the rendition of the judgments spoken of in the first part of this deposition, I will now state from what both the parties said about the judgment alluded to. I understood from the parties that the judgment was obtained a day or two days before, and it was at this time, to wit, at some one or two days after the judgment, that Moss said he was willing to arbitrate it, and authorised either my father or myself to say so to Cochran, which was done either on that day or a day or two afterwards.

"Moss when speaking of the matter to me, or in my presence, always expressed the utmost willingness to arbitrate it.

"I do not now recollect that any specific day was set apart for said purpose."

James Foley testified, "On the second or third day after the trial before the justice of the peace, the defendant, Moss, came to his house, and that he, witness, proposed to Moss to arbitrate the matter in dispute which had been tried before the justice. Moss then replied that he was willing to withdraw the suit before the justice, pay half of the costs and arbitrate it. Cochran also came to his house whilst Moss was there, and acceded to the proposition to arbitrate, and it was agreed that each one of the parties should select an arbitrator, and if necessary the said arbitrators should select an umpire. Cochran expressed fears that after the time for appealing to the Circuit Court expired, that Moss would refuse to arbitrate. He expressed these fears frequently and at different times, but he was told by witness and B. W. Foley, a lawyer, that if Moss violated his agreement to arbitrate, he, Cochran, could enjoin him from collecting his judgment and have it tried in chancery. After this time witness went to see Moss again, and he still agreed to arbitrate ; he also

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saw Cochran, who was still anxious to arbitrate. Moss told witness that Cochran had been to see him with his books, and they could not settle. Witness saw Moss and Cochran several times, and when he saw Moss he would say to witness that he could not get Cochran to arbitrate, and when he saw Cochran he would tell witness that he could not get Moss to arbitrate. Cochran said to witness after the trial that he had signed one of the notes, but he did not know which, but that the note he did sign ought to have been for \$17 12 1-2; he always denied owing the \$44 44 note; he denied executing the note at the time of the agreement to arbitrate in the presence of Moss before the ten days for appealing had expired, and constantly afterwards denied the execution of said note."

William Moore testified, "that in some day or two after a law suit between John Moss and Samuel Cochran, that he was at the residence of James Foley and there met with said Moss, who said to James Foley and B. W. Foley, that he came there to get advice from them. James Foley said he was aware that his business was in relation to a matter in dispute between him, Moss, and said Cochran. Moss said it was. Foley then said to him that Cochran had been to see his son, B. W. Foley, about the matter, and was dissatisfied with the course Moss had pursued. James Foley then proposed to Moss to arbitrate the matter, when Moss consented and said that he was sorry there was a difficulty between them, and if he, Moss, had a judgment for more than Cochran owed to him, he was willing to refund. After this consent of Moss to arbitrate, Cochran came to Foley's, (Moss still being there) as he said, to consult B. W. Foley about the matter. The proposition of Foley to Moss was made known by Foley to Cochran, in the hearing of Moss, who at first hesitated or refused to arbitrate, but afterwards consented. He gave as a reason for refusing to arbitrate, that the time might pass in which he could take an appeal. After much talk about the matter Cochran reluctantly consented to arbitrate. The terms of arbitration were to have two and if necessary a third man, and the award of the arbitrators was to be the amount collected by Moss off of Cochran. It was agreed that each party was to produce his books and other evidences of debt, by which the arbitrators might settle the difficulty between them. No arbitrators were selected or time fixed to my knowledge. It was agreed that if, on the arbitration, any thing should be found due to Moss, it was to be collected on the judgment. He heard nothing said about vacating the judgment. Cochran replied, 'I think you will not get much.'"

This evidence establishes very clearly that within one, two or three days after the trial before the justice of the peace, where Moss obtained

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his judgment against Cochran, an agreement was entered into between them to arbitrate their matters in controversy. B. W. Foley states the agreement to have been made one or two days after the trial, James Foley fixes the agreement at two or three days after the trial, and William Moore says that it took place some day or two thereafter. The agreement to arbitrate was then made within the time prescribed by law for taking an appeal from the judgment of the justice of the peace; although the defendant in his answer "cannot state positively, but believes that the ten days allowed by law for taking an appeal had elapsed before complainant made his first proposal to arbitrate."

The other point made in the bill, as the foundation of equity jurisdiction, is not so fully and clearly made out by the evidence. The testimony of the two Mr. Foley's shows that Cochran was advised that if, under the agreement to arbitrate, Moss should refuse, after the expiration of the ten days, to comply with his agreement, his resort would be to a Court of Chancery. Moore states, that when the proposition was made by Foley to Cochran (in presence of Moss) to arbitrate, that Cochran hesitated, and assigned as a reason for his hesitancy, that he was fearful the ten days might elapse, within which he could appeal from the judgment, before an arbitration could be had; but that finally Cochran did consent. The answer of Moss is, that "he was willing, and so told the complainant to submit the matter to arbitration until respondent was credibly informed that complainant had asserted publicly, and in the presence of divers persons, that this respondent had forged his, complainants, name to a note, and after that respondent admits that he did utterly refuse to arbitrate the matter." Whether this refusal was made before or after the expiration of the time allowed for an appeal, is not settled. If made before, then perhaps Cochran would have no substantial cause of complaint; but if he delayed until afterwards, then it was calculated to do Cochran harm, as it deprived him of a legal right to have his case tried anew in the Circuit Court by appeal. If we are permitted to raise an inference, as to the time of this refusal, drawn from the answer of Moss, then it is clear that it occurred after the time, for Moss, as before referred to, states in his answer, that the proposition to arbitrate was made after the ten days had expired. The refusal must have been subsequent to the agreement to arbitrate. But there are other reasons which induce the belief that the refusal was not made until after Cochran's right to appeal had been forfeited. James Foley states several interviews had by him with the parties, and that Moss always expressed a willingness to arbitrate; that at other times Moss told him that he could



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not get Cochran to fix the day for arbitration ; then Cochran complained that he could not get Moss to agree on a day. Moss also informed him that Cochran had been over with his books and they could not settle. These frequent interviews between the parties, and between them and the witnesses, residing as they did in the country, most probably extended to a period of time beyond the ten days.

There is another consideration connected with this subject entitled to controlling influence, if any doubt existed in the testimony. The issue made up on the plea of *non est factum* had been tried and found by the jury in favor of Cochran ; the Court had refused to set aside the verdict of the jury. In this state of the case the Court should not have required as strict proof to sustain the bill as in ordinary cases. The dissolution of the injunction and the dismissal of the bill by the Court, gave to Moss the entire benefit of a judgment to which the verdict of the jury declared he was not entitled, thus rendering nugatory entirely the finding of the jury.

Wherefore for the foregoing reasons the decree of the Circuit Court is reversed ; and this Court proceeding to give such a decree as that Court ought to have given, do order, adjudge and decree, that the injunction be made perpetual, and that the complainant recover of the defendant his costs in the Justices' Court, the Circuit Court, and in this Court expended, and have thereof his writ of execution.

Scott, J.

There is nothing in the record of this case which shows that the verdict of the jury on the issue was disregarded by the Court below. The evidence was sufficient to show that there was an agreement to arbitrate before the time for appealing had expired. No affidavit in writing was necessary denying the execution of the bond in the Justices' Court. See *Kennerly vs. Weed*, 1 Mo. Rep. 480, 673. I am in favor of reversing the decree.



not get Cochran to fix the day for arbitration, then Cochran complained that he could not get Moss to answer on a day. Moss also informed him that Cochran had been away with his books and they could not settle. These frequent interruptions between the parties, and between them and the witnesses, resulting as they did in the country, most probably extended to a period of time beyond the ten days.

There is another consideration connected with this subject entitled to corresponding consideration, and which existed in the testimony. The issue made up on the facts of this case, which had been tried and found by the jury in favor of Cochran, the Court and refused to set aside the verdict of the jury. In the opinion of the Court, the Court should not have required as a condition precedent to the bill as in ordinary cases. The dissolution of the partnership and the dissolution of the bill by the Court, gave to Moss the entire benefit of a judgment to which the verdict of the jury de- clined to be bound. It was not until the Court rendered negative verdict the finding of the jury.

Whether for the reasons stated, the decree of the Circuit Court is reversed, and the Court proceeding to give such a decree as that Court might have given, do hereby adjudge and decree, that the in- junction be made perpetual, and that the complainant recover of the defendant the costs in the last case, except the Circuit Court, and in this Court expended, and have thereof his wife of execution.

#### SCOTT, J.

There is nothing in the record of this case which shows that the verdict of the jury on the issue was disregarded by the Court below. The evidence was sufficient to show that there was an agreement to arbitrate before the time for appealing had expired. The affidavit in writing was necessary during the execution of the bond in the last case, Court. See *Kennedy vs. Weed*, 1 Mo. Rep. 480, 678. I am in favor of re- versing the decree.

## MARCH TERM, 1847.

### EVANS & RIEHL vs. LABADDIE.

1. The title acquired by an entry with the Register and Receiver of the U. S. Land Offices, on which no patent has issued, will yet pass to the grantee in a deed purporting to convey the land in fee simple absolute, made before the entry by the person entering the land.
2. A deed conveying a tract of land subject to the conditions of an agreement by which the vendor is bound to convey one-half the land to a third party, vests the legal title to the whole tract in the vendee.
3. The certificate of the Surveyor General that a certain lot of land is embraced within the limits of a tract confirmed by the Board of Public Schools, under the act of 1824, is not evidence.
4. Sales made in this State by the Marshal of the U. S., on executions from the U. S. Courts, are governed by the laws of this State regulating executions.

SCOTT, J., dissenting as to 1st point.

### APPEAL from St. Louis Circuit Court.

#### *Statement of the Case adopted by the Court:*

This was an ejectment in the St. Louis Circuit Court by Labaddie against Evans & Riehl for a lot of ground in the city of St. Louis, brought on the 19th October, 1841. It was tried 7th Feb'y, 1844, and a judgment rendered for plaintiff below. A new trial was asked for, 1st, because the verdict was against evidence; 2nd, against law and evidence; 3rd, against the weight of evidence; 4th, because the court improperly admitted evidence; 5th, because the court gave wrong instructions for plaintiff; 6th, because the court refused to give instructions asked by defendant; 7th, be-

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cause the court, of its own motion, gave wrong instructions; 8th, because of newly discovered evidence. This motion was overruled. The affidavit disclosing newly discovered evidence, as it is called, merely states that since the trial the defendant has obtained a deed for half of the land from the administrator of R. Duncan, on a sale previously made by the Probate Court.

The bill of exceptions is long, but the following is a brief abstract of the facts. The plaintiff read in evidence a paper executed by A. H. Evans, one of the defendants, to Elias T. Langham, dated January 9th, 1836, wherein Evans relinquished to Langham the lot of land in question; also, a deed from said Langham to William T. Sanford, dated 14th March, 1838, for the same lot and two others, for the consideration of \$1500, stated in the deed to have been paid, which was recorded 16th April, 1838; also, a deed from said Sanford to the plaintiff, dated the 13th of July, 1840, for same lot, recorded 9th November, 1840. The plaintiff having also proved possession of the lot at the time of the commencement of suit by defendants, and the rents and profits, and also monthly value, rested his case.

The defendants then proved that Evans built the house and made the improvements on the lot in question, and gave in evidence a designation of land, signed by Silas Reed, Surveyor, &c., dated 17th Jan'y, 1844, setting apart a parcel of land, which embraced said lot, for the use of schools, and is bounded south by Soulard, west by the Mackay tract, north by Auguste Chouteau, and east by the Mississippi, and is precisely the same piece of land that was fractional section 26, township 45 north, range 7 east of the 5th principal meridian. The defendants then read in evidence the Receiver's duplicate receipt, dated 2nd May, 1836, evidencing a sale to Robert Duncan of said fractional section; also the plat of survey of the same; also a judgment record, comprehending merely the judgment itself, without the writ, declaration or pleading, which judgment was rendered on the 4th April, 1839, in the United States Circuit Court for the Missouri district, in favor of the United States against said Langham, for \$10,796 36; also an execution thereunder, dated 10th Oct'r, 1839, and Marshal's deed, dated 13th April, 1840, setting forth advertisement and sale to Evans on the 3rd April, 1840, of said fractional section for the sum of \$100, and conveying to him all such right as Langham had at the time of the rendition of the judgment; which deed was recorded 20th April, 1840. The defendant likewise gave in evidence an agreement between Robert Duncan and said Evans, dated 20th December, 1834, stating that Duncan had proved a pre-emption right to said piece of land, (viz: fractional section 26, aforesaid,) and agreed to let Evans have one-half of that which lay between the little creek, Soulard, and Mackay, on Evans paying the Government for the whole; and also, a proportion of another pre-emption right, on his paying Government also for that. This agreement was recorded 12th May, 1836. Evidence was given tending to show that Labaddie purchased said lot from Langham and paid him, and then applied to Sanford and got a deed for the same, Sanford telling the witness that he did not own the lot and that he had deeded it to Langham. It appeared that Sanford was dead when the trial was had. The defendant here closed his case.

The plaintiff then read in evidence a deed from Robert Duncan to said Langham, dated 29th June, 1835, conveying to him the said tract of land entered by him according to said Receiver's receipt and subject to the said article of agreement made between him and Evans of 20th December, 1834, which land included the lot in question. The plaintiff gave in evidence a plat of subdivision of said fractional section 26, showing that it was laid off into town lots.

The defendants asked eleven instructions, of which the 2nd, 3rd, 5th and 7th were given, and the others refused.

1. The court is requested to instruct the jury, that if they find from the evidence that the lot of ground mentioned and described in the plaintiff's declaration is embraced within and belongs to the land set apart and reserved for the use of the town of St. Louis for the benefit and support of schools, as more particularly set forth and described in the certified designation from the office of the Surveyor General of the Public Lands in the States of Illinois and Missouri, which said certified designation has been read in evidence, they will find for the defendants.

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2. If the jury find from the evidence that no title to the land in question has passed from Duncan to the present plaintiff, by direct deed or intermediate conveyance, they will find for the defendants.

3. That the certificate of the Receiver, read in evidence, is evidence of title in Duncan from the date of the same.

4. That the deed read in evidence from Duncan to Langham, as far as it relates to the land in question, being subject to conditions expressed or referred to in the deed, the condition must be taken in connection with the deed, and if, from both condition and deed, Evans was a joint tenant with Langham, they will find for the defendants, unless they find from the evidence that Evans' interest has been legally conveyed to the plaintiff.

5. That the judgment of the United States against Langham was a lien on the land of Langham from the rendition of the same, and that the sale of the Marshal to Evans passed to Evans all the title that was in Langham at the time of the rendition of said judgment or sale.

6. That the United States are entitled to priority, and that their priority commences as early as the service of the writ vs. Langham, and the subsequent sale by the Marshal passes to Evans all the title of Langham at the time of the said service and at the time of the sale.

7. That the writing offered in evidence by the plaintiff, bearing date 9th May, 1836, and purporting to be a relinquishment from Evans to Langham of the land in question, passed no legal title to Langham.

8. That if the jury find from the evidence, that at the time of Sanford's deed to Labaddie, the plaintiff, Langham, was the owner of the lot in question, and by a previous conveyance from Sanford, and while so owned by Langham, the United States obtained a judgment against Langham, the said judgment and sale under it passes the title to the said purchaser under said sale.

9. That the Marshal's sale and deed passes the title to Evans, the defendant, and the title so obtained by Evans does not enure to Langham and his grantees.

10. That the statement of William T. Sanford to Edward Warrens, the agent of the plaintiff, Labaddie, at the time of the execution of the deed from Sanford to Labaddie, that he was not the owner of the land and had previously deeded the same to Langham, and the testimony of Warrens that no consideration money was paid Sanford, together with the fact that Labaddie purchased of Langham the land in question and paid him, Langham the consideration, is competent testimony to show title in Langham at the time of Sanford's deed to Labaddie.

11. That the evidence of Sigler, the witness produced by the plaintiff, that he purchased a portion of the same tract from Langham originally belonging to Duncan and sold to Langham, and also took his deed from Sanford at the time without payment to Sanford but with payment to Langham, is competent testimony to show title in Langham at and before Sanford's deed to Labaddie.

The Court, of its own motion, gave the following instructions:

The Marshal's deed passes nothing to Evans except such interest, if any, which Langham had at the date of the judgment upon which the Marshal's sale was had.

If the jury believe from the evidence that the conveyance of Langham to Sanford was made with the intent to hinder, delay, or defraud creditors, prior or subsequent, the same is void, and any acts or declarations of Langham and Sanford upon the occasion of the conveyance to Sanford, or any acts or declarations of Sanford or of Langham sanctioned by Sanford after the conveyance, may be offered in evidence. Such conveyance of Langham, however, is not void as to Labaddie, unless he was party or privy to the fraud intended, or had actual notice thereof.

The Court then gave the following instructions asked by plaintiff:

That there is no evidence of the conveyance of the lot in dispute by Sanford to Langham. 2. B.

That the designation by the Surveyor General of the land for the use of Public Schools, read in evidence in this cause, shows no title in the St. Louis Public Schools to the lot in controversy.—

3 B.

That the deed under the Marshal's sale, with the record of judgment under which the same

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was made, as read in evidence in this case, shows no legal outstanding title in bar of plaintiff's action. 4 B.

The Court then, of its own motion, gave the following instructions:

Any title that vested in Duncan by the Receiver's certificate, immediately passed to Langham, if Duncan had then before conveyed said land to him. 1 A.

The article of agreement between Duncan and Evans, dated 20th Dec'r. 1834, passed no legal title to Evans in the land in controversy. 2 A.

At the conclusion of all the testimony and instructions, is the following: "To all of which instructions so asked by the plaintiff's counsel and given by the court, and to all which decisions and refusal to instruct, and to the giving the instructions on the court's own motion, and the giving of the instructions asked for by the plaintiff, and to the admitting of the testimony and evidence of the plaintiff, the defendant excepted."

The motion for new trial was made on the 9th Feb'y, and an affidavit as to newly discovered evidence was sworn to and filed on the 23rd Feb'y. The reasons and affidavit are set forth in the bill of exceptions, immediately following the instructions, and then it is stated that the court "overruled the motion, and rendered judgment upon the verdict of the jury. To all which judgments, decisions and actions of the court, the defendants, by their counsel, except and write this their bill of exceptions," &c.

The assignments of errors are five, as follows:

1. The general assignment of error.
2. That the court refused to give the 1st, 4th, 6th, 8th, 9th, 10th and 11th instructions of defendants.
3. That the court gave plaintiff's instructions, marked (2 B,) (3 B,) (4 B,) (1 A,) and (2 A.)
4. That the court allowed plaintiff to give in evidence the deed of Duncan to Langham, without evidence of title in Duncan.
5. That the court refused to grant a new trial.

## POINTS AND AUTHORITIES.

*LESLIE, for Appellants, contends:*

1. That the plaintiff has shown no such title to the land in dispute as entitles him to recover in this action.
2. A Register and Receiver's certificate passes no title to the land purchased, but the same remains in the government of the United States until a patent issues therefor according to the laws of the United States. 13 Peter's, 498, Jackson vs. Wilcox; 13 Peter's, 436, Bagnell vs. Brodrick.
3. The deed from Duncan to Langham was improperly admitted in evidence, because the deed conveys but an undivided interest in the lands sued for, and therefore is no evidence to support ejectment, inasmuch as one tenant in common cannot maintain a separate action for the entire premises. 5 Eng. C. L. Rep., 4.
4. The court ought to have given the 8th, 9th, 10th and 11th instructions asked by defendants.
5. The defendants' motion for a new trial ought to have been granted. The principle which obtains on motion for a new trial for newly discovered evidence is directly applicable to the point in question; and that which would give a new trial in the first case, would, upon principles of law, prevail in the case at bar.

*SPALDING, for Appellee, contends:*

1. The title out of the United States was originally in Duncan, and by his deed vested in Langham, which inured to the benefit of Sanford, and through him to the benefit of plaintiff. The



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deed of Duncan to Langham is prior in date to that of Langham to Sanford. Rev. Code of 1835 and 1825, title Conveyances; 3 Dal., 425; 6 Mo. Rep. 106, 113.

2. There is no objection to any of the testimony preserved on the record; the general statement at the close of the bill of exceptions, that the defendant excepted to all of plaintiff's testimony, will not answer. 8 Mo. Rep., 128; 3 Howard's Rep., Camden vs. Doremus, Suydams and Nixon. Besides, it was relevant and competent, although it may not have fully proved the case.

3. The deed from Duncan to Langham conveyed the whole estate of Duncan, and not merely the undivided half, as was contended by defendant below. There is not any condition on the face of the deed; but it conveys subject to an agreement with Evans. The title passed subject to that agreement.

4. The 8th instruction of defendant ought not to have been given, because—First, It assumes that there was evidence of a previous conveyance by Sanford to Langham when there was none; Second, It is equivocal in the word "owner," for it there might be considered in its popular sense, and Langham be the "owner" while the legal title was vested in Sanford; Third, It assumes that the Marshal's sale passes title.

4. Defendant's 9th instruction was wrong, and was therefore rightfully refused. It asserts that the Marshal's sale and deed passed the title to Evans, &c. It is wrong in three particulars:—

First, The record shows no authority in the Marshal to make the sale and deed. There was proved no rule of court, and there is no act of Congress authorizing it. Second, No act of Congress, rule of court or practice was proved or shown establishing the right to proceed to sell in the mode adopted. Third, The judgment record is incomplete and shows no authority to sell.—Fourth, It assumes that there was title in Langham, and thus shuts out the consideration of the jury.

6. The 10th instruction of defendant was wrong. The bare statement of Sanford that he had made a deed to Langham, is not competent testimony of such conveyance.

7. The 11th instruction of defendants was also illegal, for Sigler's transactions as to another lot proved nothing as to the one in question, and even if it did, it proved only that Labaddie held the property for Langham—not that he had conveyed it to him.

8. The title of the Public Schools set up by defendant cannot avail, as the proof thereof was incomplete, and as defendant also showed another title prior in date emanating from the United States to Duncan, and as defendants were not in a situation to set up such outstanding title. 9 Mo. Rep., Macklot vs. Dubreuil, shows that defendants could not set up the school title.

9. There was no ground for new trial on the affidavit of newly discovered evidence. The deed should have been shown, &c. Duncan had no title, and his deed would have conveyed nothing, as he had conveyed the whole to Langham; and further, it is not a case like one of newly discovered evidence. The court is asked to let in a defence that accrued after the trial and judgment. 7 Mo. Rep., 497, new trial will not be granted when it is evident that the party applying could derive no benefit thereby.

10. There is no ground for new trial in any of the other instructions.

*NAPTON, J., delivered the opinion.*

The principal question in this case depends upon the effect of the deed from Duncan to Langham, dated 29th June, 1835. That deed purported to convey a certain tract of land in St. Louis county, describing it by its metes and bounds, it being a tract to which the grantor, Robert Duncan, claimed a pre-emption under the several acts of Congress, commencing with the act of 12th April, 1814. Duncan's entry of the tract was not

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made until May 2, 1836, nearly a year after this conveyance to Langham; and this raises the question whether this subsequently acquired title of Duncan will pass to Langham by virtue of the previous deed. The solution of this question depends altogether upon the construction of the third section of the act concerning conveyances, which provides as follows: If any person shall convey any real estate by a conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance. This statute, it will be perceived, is not a recognition of the common law, but is a material modification of it. The doctrine on this subject at the common law, is thus laid down in Coke Littleton, s. 446: By a release, no right passeth but the right which the releaser hath at the time of the release made; as if the son release to the disseisor the right which he hath or may have, without clause of warranty; after the death of his father, the son may enter against his own release, because he hath no right at all at the time of the release made, the right being at the time in the father. Had there been a warranty, it would have operated by way of estoppel. Our statute is silent about any warranty; where the deed purports to convey a *fee simple absolute*, whether with or without warranty, the subsequently acquired legal title will pass.

It is quite apparent in looking at this act, that a strict and literal construction may be given to it, which will exclude from its operation the title which Duncan acquired by his entry at the United States Land Office. This title, it is said very properly, is not a legal title; that being in the United States until the patent has issued. This objection admits that if the patent had issued, the title so acquired by Duncan would, by virtue of this legislative enactment above referred to, pass at once to Langham.

Our act regulating the action of ejectment authorizes this action to be maintained upon an entry with the Register and Receiver. Whether this title be called then a legal or an equitable one, it is one upon which its holder may maintain an action of ejectment. If we adopt the construction which makes this title by entry a legal title when the action of ejectment is spoken of, but an equitable title only when the act concerning conveyances is construed, we shall have a most singular and awkward condition of things brought about by this legislation. A. conveys

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to B. a tract of land upon which he has a claim, and subsequently enters the land. His *entry* will enable him to bring an ejectment, and oust the purchaser, B.; whereas, *if the entry had been consummated in a patent*, his title would have passed by virtue of this section of our law of conveyances at once to B. and no action of ejectment could have been maintained! If the title by entry was a mere equitable title, in the proper sense of that term, before the interference of our statute concerning the action of ejectment, no such absurdity would be presented, and the grantee designed to be protected by the third section of the law of conveyances could wait without inconvenience for the emanation of the legal title. But if an entry with the Register and Receiver be such a title as will maintain an ejectment, then it must follow that, whether that title is called a legal or an equitable one, it has all the elements which constitute that sort of a title designed to be affected by that provision in the statute of conveyances to which we have heretofore alluded. That section obviously designed that any title coming to a grantor *which would clothe him with the power of turning his grantee out of possession*, should not vest there, but pass on directly by operation of law to the grantee.—The words ‘legal title’ are used in this sense, and to all intents and purposes the title which maintains ejectment is a legal one. Will it be pretended that one who has title by entry cannot convey that title to another so as to enable that other to bring his ejectment? I mean where the conveyance is subsequent to the entry. If this be conceded, and it is held, that the title by entry will not enure to the grantee under a grant previous to the entry, but at the same time is a sufficient title to maintain ejectment, then in the interval from the entry to the emanation of the patent, the title will be in a situation to enable the holder to commit the grossest frauds. Here is a conveyance before an entry, and the grantee, so soon as the patent has issued, it is conceded, will get the title which issues to the grantor; but as the title by entry is also capable of being conveyed, and of being conveyed so as to enable the vendee to bring ejectment thereon, a grantee subsequent to the entry will acquire a good title, *the continuance of which will depend upon the amount of business in the Patent Office at Washington.*

A second question which has been discussed in this case, arises upon this same deed from Duncan to Langham. This deed conveys the tract of land, embracing the lot now in dispute, to Langham “subject to the terms and stipulations of an article of agreement between him and A. H. Evans, which bears date, &c., and is herewith delivered to said

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Langham." This agreement between Duncan and Evans was made 20th Decem., 1834, and it was in substance that, so soon as Duncan acquired the title from the United States, he "was to let the said A. H. Evans have one-half of the pre-emption," &c. This, then, was an agreement to convey, not a conveyance. Duncan conveys to Langham subject to this agreement; Langham consequently occupies the position of Duncan and holds the title subject to his agreement to convey one half the land to Evans.

The defendant below, in addition to the objections to the plaintiff's title already alluded to, relied upon an outstanding title in the St. Louis Common Schools, and a title acquired by himself under a sale by the United States Marshal on an execution against Langham in 1840. In relation to the title of the Public Schools, but little need be said, as the only evidence of that title was a paper from the Surveyor General's Office purporting to be a designation of this tract of land (among others) as one of those confirmed to the Board of Public Schools by virtue of the act of 1824. This certificate states that the lot in controversy is within the limits of the out boundary of St. Louis; that it was not owned or claimed by any person in 1812; that it is no part of the St. Louis Common, and consequently it is within the second section of the act of 26th May, 1824. Of these several matters thus certified to, the Surveyor General is not the judge, and his certificate alone has not been made even *prima facie* evidence of title, as the certificate of the Recorder was under the same act, in relation to another class of lots.

There are two objections urged to the title derived by Evans under the Marshal's sale: First, that the rules of the court wherein the judgment is obtained were not shown, so that we could ascertain whether the sale was made in conformity to law; and, secondly, admitting the rule to be valid and regular, it only conveyed an equitable title, as Langham had only an equitable title at the time of the judgment upon which the execution issued, and under which the sale was made. The first objection, we think, is not a good one. The third section of the act of May 19, 1828, (4 Story, L. U. S. ch. 68,) declares that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each State respectively, as are now used in the Courts of such State, saving to the United States Courts in those States where there are no Courts of Equity, the power of prescribing the mode of executing their decrees in equity;—provided, that it shall be in the power of the Courts, if they see fit, in their discretion, by rules of

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*Evans & Richl vs. Labaddie.*

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court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the Legislature of the respective States, for the State Courts. The advertisement and sale by the Marshal must be governed, not by any rules of the Circuit Court of the United States, but by the laws of this State. No objections to the validity of their sale, from any want of conformity to our laws regulating sheriffs' sales, has been suggested. But a substantial objection to the availability of this title in the present action arises out of the fact, that Langham had conveyed the lot in controversy to Sanford nearly a year before the judgment was obtained, on which the execution issued. It is true, that if this conveyance was made by Langham to defraud his creditors, it is a nullity, so far as those creditors are concerned; but this question, if it was designed to be raised, seems not to have been distinctly placed before the jury by any of the instructions asked of the Court. The 8th instruction which the defendant below asked, but which was refused, was in these words: "If the jury find from the evidence that at the time of Sanford's deed to Labaddie, the plaintiff, Langham, was the owner of the lot in question, and by a previous conveyance from Sanford, and whilst so owned by Langham the United States obtained judgment against Langham, the said judgment and sale passes the title to the purchaser under said sale." Here is an assumption of a conveyance from Sanford to Langham about which there was no proof before the jury. A witness, it is true, does testify that whilst acting as agent for an individual who had purchased a lot in this same tract, he called upon Sanford for a deed, by Langham's direction, and was informed by Sanford that he (Sanford) had no title, having reconveyed to Langham. This may be evidence of a fraud, but not of a deed. The 9th instruction was, that the Marshal's sale and deed pass the title to Evans, the defendant, and the title so obtained by Evans does not enure to Langham. This instruction was also refused, and properly, because it was calculated to convey the impression that the title so acquired was a legal one. In the 10th instruction, the Court is requested to instruct the jury that the statement of W. T. Sanford to Edward Warrens, the agent of the plaintiff, Labaddie, at the time of the execution of the deed from Sanford to Labaddie, that he was not the owner of the land and had previously deeded the same to Sanford, and the testimony of said Warrens that no consideration was paid Langham, together with the fact that Labaddie purchased of Langham the land in question, and paid him, Langham, the consideration, is competent testimony to show title in Langham



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*Evans & Riehl vs. Labaddie.*

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at the time of Sanford's deed to Labaddie. The 11th instruction is on the same subject, and its object is to declare the testimony of another witness, that he purchased a portion of the same tract from Langham, originally belonging to Duncan and sold to Langham, and also took his deed from Sanford at the time, without payment to Sanford, but with payment to Langham, as competent testimony to show title in Langham at and before Sanford's deed to Labaddie. It is quite apparent that the only tendency of this evidence is to show an equitable title in Langham, with a legal title in Sanford, all of which may have been honest or fraudulent according to circumstances, and those circumstances do not appear. The pecuniary condition of Langham at the time of these several conveyances is not shown; whether he was largely indebted or not, or whether his property was amply sufficient to pay his debts or not, are facts about which no testimony was offered.

The judgment of the Circuit Court is affirmed, Judge McBRIDE concurring.

SCOTT, J., *dissenting.*

I do not concur in the opinion that the conveyance of the equitable title to Duncan enures to the benefit of Langham. The statute on the subject applies only to legal estates, and there is no foundation in the common law for the idea that a deed of conveyance will pass a subsequently acquired title. The distinction between legal and equitable estates is as broad as that between light and darkness, and we cannot suppose that any legislator, in a country where the common law prevails, would be unapprized of it. Statutes which cover the ground previously occupied by the common law, must be construed in reference to it. The doctrine of the common law was, that no right passed by a conveyance but that which the party had at the time of its execution. *Nemo dat quod non habet*. But if there was a warranty in the conveyance, then the conveyance operated. For, albeit, the conveyance cannot bar the right for the cause aforesaid, yet the warranty may rebut and bar the grantor of a future right which was not in him at that time, and this is for avoiding a circuitry of action. 2 Coke, 265-6; 4 Maul. & Sel., 480; 9 Cowen, 13; 4 Wend., 300. This doctrine is strictly applicable to legal conveyances. This being the state of the common law, a statute enacts, if a person shall convey any real estate by a conveyance purporting to convey the same in fee simple absolute, and shall not at the

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*DuBreuil, et al. vs. the State, to the use of Rosenbaum & Boyhardt.*

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time of such conveyance have the legal estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.— Now if an equitable estate in land had been a thing unknown to the Legislature at the time of the enactment of this law, and had subsequently sprung into existence, there might be some propriety in saying it was in the contemplation of the General Assembly. But equitable estates were well known; the difference between them and legal estates was before the Legislature, as may be seen by reference to the statute concerning ejectment, enacted at the same session that the statute concerning conveyances was enacted. Under these circumstances, how can this Court be warranted in interpolating the word equitable into the statute? Such a power, under the circumstances is clearly legislative.

When a deed of conveyance is made by a party having no title, if the grantee will put it upon the record, it will protect him from all subsequent alienations made by the grantor.

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DU BREUIL, ET AL. VS. THE STATE, TO THE USE OF ROSENBAUM & BOYHARDTT.

To make a constable, or his securities, liable on an execution, it is necessary to prove that the execution was delivered to the constable.

### APPEAL from St. Louis Court of Common Pleas.

PRIMM, for *Appellants*, insists :

1. From the transcript, it appears that the second writ of *ca. sa.*, if it even came into DuBreuil's hands, should have been returned on the 16th August, 1841, from which time, up to the 11th March, 1846, when the verdict was rendered in the court below, the plaintiff can only recover the damages of one hundred per cent. This is a period of about 4 years and 7 months. The verdict should not have exceeded \$45 83 1-3, the debt due on the *ca. sa.*, being only \$10 00.

2. This suit is based upon the act respecting Justices' Courts. § 22 and 23 Rev. Code 1835, p. 368.

The remedy provided in the last section cited, against the constable and his securities, does not deprive them of the defence contemplated by section 22.

The bill of exceptions discloses that they have shown good cause why judgment should not be

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*DuBreuil, et al. vs. the State, to the use of Rosenbaum & Boyhardt.*

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rendered against them. The witnesses fix no liability upon DuBreuil, because they do not prove that he ever received the writ of *ca. sa.*

The instruction, therefore, given by the court was too broad. It took away from the jury the power to judge of the sufficiency of the cause shewn by the defendants, and narrowed down their inquiry to a mere question of identity of person.

3. The instructions asked for by defendants should have been given.

The transcript certified by Justice Butler states that on the 16th day of August, 1841, an *alias ca. sa.* was issued by the justice to the said constable, DuBreuil, but it does not state that it was delivered to him.

DuBreuil and his securities cannot be held responsible unless it be *proven* that the writ was delivered to DuBreuil. No such proof is found in the transcript; none such is made by the witnesses.

The fact of delivery to the constable was one which was taken away from the jury; a fact of which it was their province to judge, and from which they were cut off by the instructions refused, as well as by the instructions given.

McBRIDE, J., delivered the opinion of the Court.

This was an action commenced before a Justice of the Peace against a constable (and his securities) on his official bond. The defendants obtained judgment, from which the plaintiffs took an appeal to the Court of Common Pleas, where judgment was rendered in their favor; thereupon, the defendants appeal to this Court.

The bill of exceptions show, that upon the trial in the Court of Common Pleas, the plaintiff read in evidence the official bond of DuBreuil, the constable, and also a transcript of a judgment obtained before John Black, late a Justice of the Peace, certified by Mann Butler as his successor in office, wherein the said Rosenbaum & Co. were plaintiffs, and one Aldrich was defendant. The judgment was for \$10 and costs of suit, and was rendered on the 1st June, 1841. On the 15th June, 1841, a *ca. sa.* was issued by the justice, which was, on the 16th August, 1841, returned by the defendant "no goods or chattels of defendant, nor defendant found." On the same day, an *alias* writ was issued by the justice to the said constable, which was not returned.

Evidence was then offered conducing to show that it was the usual custom for the justices to issue their process directed to a particular constable, (there being two in St. Louis township,) though it was not the universal practice—that the process thus issued was by them placed in a rack in their office, and the constables would call and take them out, whether the justice was present or not—that the first writ issued in the case of Rosenbaum & Co. and against Aldrich, was received by the defendant, and by him returned; but whether the second or *alias* writ was received

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by the defendant, the justice could not state, as he had no recollection on the subject. Sometimes the process was directed generally, "to the constable," &c., and in such cases, the first constable who called at the office obtained it. The process in this case was so directed. The balance of the evidence was of a negative character.

Thereupon, the court instructed the jury that, "if the jury believe from the evidence that the constable, DuBreuil, mentioned in the transcript of the justice read to them, is the constable upon whose bond this suit is instituted, they will find for the plaintiffs." To the giving of which the defendants excepted, and then moved the court to give to the jury the following instructions: "That even if the jury shall believe from the evidence that the said *alias* writ of *feri facias* was so issued and delivered, as stated in the plaintiff's declaration to the defendant, DuBreuil, yet if the defendant has satisfied the jury by evidence of the reason of his not returning the same, and said reason is a satisfactory excuse for not returning the same, they will find for the defendants."

"That it is competent for the defendant, by evidence, to explain the *prima facie* case made out by the transcript introduced by the plaintiff, and if the jury are satisfied from the evidence that although the *alias* writ of *feri facias* was issued by said justice Black, yet if the same was not delivered to said constable, or that said constable never received the same, they will find for the defendants."

"That if the jury find from the evidence that the said *alias* writ of *feri facias* was issued by the justice, yet the same was not delivered or received by the constable, DuBreuil, they will find for the defendants."

Which the court refused to give, and the defendants excepted. Thereupon, the jury retired to consider of their verdict, and not being able to agree, were, by order of the court, brought into court, and by the court told that the only enquiry they were to make was, whether Louis DuBreuil, whose name was affixed to the bond given in evidence, was the same man whose name appeared in the transcript; and if they were satisfied of that fact, it was the only issue in the case, and they must find for the plaintiffs.

The first instruction asked for on the part of the defendant was properly overruled by the court, as there was no evidence upon which to predicate it. The defendant offered no excuse for not returning the *alias* writ, but relied in his defence upon the fact of his not having received the writ. It is not impossible to establish by evidence a sufficient legal excuse for failing to return a writ according to its command, but it was

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*City of St. Louis vs. John Smith.*

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not attempted in this case, and hence the instruction was impertinent.

We are of opinion, however, that the court erred in giving the instruction which it did at the instance of the plaintiffs, and in refusing the second and third asked by the defendants; as also in the oral charge to the jury. Before a constable can be subjected to the penalties of the law for failing to execute or return process according to its command, it is of the utmost necessity to establish by evidence the fact that he received the process to be by him executed. If it is a legal presumption that he did receive it, then perhaps the rule of law as delivered by the court below, in the instruction and charge given to the jury, might be maintained; but it is a question of fact, and the fit, and indeed the exclusive duty of the jury to find from the evidence adduced in the cause. Whether the constable executed the bond sued on, had not been put in issue, and was consequently admitted; but this admission by no means established the other facts necessary to be made out by the plaintiff before he was entitled to a recovery. If the identity of the defendant was the only question for the jury to find, then the introduction of the justice's transcript, of the judgment, the *feri facias*, the return of the constable thereon, and the issuing of an *alias* writ, should have been excluded as evidence, inasmuch as they shed no light on the issue of personal identity.

The judgment of the Court of Common Pleas ought to be reversed, and the other Judges concurring, the same is reversed, and the cause remanded to that court for a new trial.

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CITY OF ST. LOUIS vs. JOHN SMITH.

In a proceeding to recover a fine for the violation of a city ordinance, it is not necessary for the statement to be as technical as an indictment. It is sufficient to inform the defendant of what he is called upon to answer.

ERROR to St. Louis Criminal Court.

CARROLL, for plaintiff in error, insists:

1. The charge of the City Attorney is sufficient to enable the defendant to understand distinctly what he was called upon to defend.



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*City of St. Louis vs. John Smith.*

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2. He is charged with violating the provisions of a certain ordinance, the title of which is given, and the day stated upon which it was approved. The name of the officer is stated; the particular office he held is set out; and the offence declared to be an attempt to rescue from said officer a person in his custody as a prisoner; and the penalty prescribed by the ordinance is correctly stated.— Now it seems impossible that *more* could be stated than all this.

*PRIMM, for defendant in error, insists:*

1. There is nothing preserved in the bill of exceptions by which this court can judge if the court below erred.

*McBRIDE, J., delivered the opinion of the Court.*

The City of St. Louis brought her action of debt before the Recorder of said city, against the defendant, on the following complaint:—

“State of Missouri, City of St. Louis, A. D. 1846.

John Smith, To the City of St. Louis,

Dr.

To one hundred dollars, for this, to-wit: He, the said Smith, was, in the city of St. Louis, on and between the 1st day of January, eighteen hundred and forty-six, and the 20th day of April, eighteen hundred and forty-six, guilty of a breach and violation of an ordinance of the said city of St. Louis entitled “An ordinance for the punishment of persons obstructing or interfering with any city officer in discharge of duty,” approved on the 6th June, A. D. 1845; in this, to-wit: he, the said Smith, did then and there interfere with a city officer, to-wit: Asa Hutchinson, a member of the City Guard, in the discharge of his official duty, and in this, to-wit: he, the said Smith, did then and there attempt to rescue from an officer, Asa Hutchinson, a person by him arrested in the official discharge of his duty. By reason of which, he, the said Smith, has subjected himself to a fine of \$100 to the use of the city of St. Louis,—for the recovery of which fine, the said city of St. Louis now sues and brings her action of debt against the said Smith, on the information of Charles C. Carroll, City Attorney of the city of St. Louis.”

The defendant having been arrested by the Marshal, was admitted to bail for his appearance before the Recorder to answer the complaint.— On the 20th of April, the defendant appeared, and a trial was had before the Recorder, who, after hearing the evidence, assessed a fine of twenty-five dollars against the defendant, and entered judgment therefor; whereupon, the defendant prayed and obtained an appeal from the said judgment to the Criminal Court of St. Louis county.

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*The State of Missouri vs. John H. Gay, et al.*

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In the Criminal Court, the defendant moved the said court to dismiss the cause for the reason that the charge against him was insufficient and defective; which motion the court sustained and dismissed the cause, entering judgment against the city for the costs that had accrued: thereupon, the City Attorney filed his motion to set aside the said judgment, for the reason, first, the judgment of the court in rendering said judgment, was against law; second, the offence with which the defendant was charged was sufficiently set forth in the charge of the City Attorney, and therefore the court erred in rendering said judgment. The court overruled the motion, and the city excepted and has brought the case here by writ of error.

The only question presented for our consideration is, whether the complaint filed by the City Attorney is sufficiently explicit; and here it may be remarked that the proceeding against the defendant before the Recorder is an action of debt, and may be assimilated to a proceeding before a justice of the peace. All, therefore, which is required is that degree of certainty necessary to inform the defendant of what he is called upon to answer, and not that particularity which is technically necessary to constitute a good indictment. Tested by this rule, we can see no reasonable objection to the complaint, for it alleges the ordinance violated, with the time and place of violation, and the attendant circumstances, so as fully to advise the defendant of the cause of action. The only omission which we have noticed in the statement is, the failure to set out the name of the individual attempted to be rescued by the defendant from the officer, and this omission we do not conceive to be sufficient cause for dismissing the case.

Wherefore, the judgment of the Criminal Court in dismissing the case was erroneous, and is hereby reversed, and the cause remanded to that court, for further proceeding to be had therein.

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THE STATE OF MISSOURI vs. JOHN H. GAY, ET AL.

1. Several persons may be jointly indicted for any offence which may be committed by several.
2. In such indictment, it is not necessary to allege that defendants were partners—there being no partnership in crime.
3. Where several are jointly indicted, the punishment of each shall be separately assessed.

*The State of Missouri vs. John H. Gay, et al.*

**ERROR to St. Louis Criminal Court.**

**STRINGFELLOW, Attorney General, for the State.**

1. The indictment is in proper form. In the case of the State vs. Harrison, 9 Mo. R., 530, an indictment in this form was held good.
2. Two or more may be jointly indicted for keeping a ferry. Any number of persons may be jointly indicted for any offence which may be committed by several jointly.
3. It is not necessary to allege that they were partners—they may not have been partners—indeed, there are no “partners” in crime. Principals, agents and servants may all be jointly indicted.

**SCOTT, J., delivered the opinion of the Court.**

This was an indictment against the defendants for keeping a ferry without license. A demurrer to the indictment was sustained. The principal question in the cause is, whether several may be joined in one indictment for keeping a ferry without license. Notwithstanding some conflict of opinion in the books as to the cases in which several may be joined in one indictment for an offence, the principle seems well established, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one cannot be the offence of another, but every one must answer severally for his own crime; yet if it wholly arise from any such joint act, which in itself is criminal without any regard to any particular personal default of the defendant, as the joint keeping of a gaming house, the joint commission of a felonious assault, or maintenance, or extortion, &c., in such cases the indictment may either charge the defendants jointly and severally or may charge them jointly only, without charging them severally, because it sufficiently appears from the construction of law. And on such indictments some may be convicted and others acquitted. 2 Hawkins, 342. There is no partnership in crime, and it is not necessary to allege that several committed an offence as partners. In the case of Rex vs. Benfield & others, 2 Bur. 980, the Court of King's Bench sanctioned the principle above stated, and held that several may be jointly indicted for singing a libellous song. The case of W. & G. Vaughn vs. State, 4 Mo. Rep., 530, may seem at variance with the doctrine above stated, but it cannot be considered as overturning the well established principles of law, and is predicated on the idea that the act of auctioneering is of such a nature that it cannot be performed jointly.

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*The State vs. Laflin, et al.—Pierre Obouchon vs. John Boon.*

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When several are joined in one indictment, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant, for otherwise one who has paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. 2 Hawkins, 633.

The other Judges concurring, the judgment will be reversed.

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THE STATE vs. LAFLIN, ET AL.

**ERROR to St. Louis Circuit Court.**

*Scott, J., delivered the opinion of the Court.*

This case is in all respects similar to that of the State vs. John H. Gay, et al. The other Judges concurring, the judgment will be reversed and the cause remanded.

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PIERRE OBOUCHON vs. JOHN BOON.

It is error in the court to instruct the jury that there is no evidence to prove a fact to be found by the jury, if there be any evidence conducing to establish such fact.

**APPEAL from St. Louis Circuit Court.**

**G. W. GOODE, for Appellant.**

**LESLIE, for Appellee:**

The instruction of the court was correct, for the evidence given on the part of the plaintiff neither showed the possession of the horse at the time the writ of replevin was executed, in the defendant, nor within one year next previous, the latter of which is necessary under cur

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*Pierre Obouchon vs. John Boon.*

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statute. See R. S. page 921, sec. 3; and the former under well settled principles of the common law. Saunders on Plead. and Ev., 766; Camp., 476.

The testimony of a witness that he saw at one time the horse in question tied in defendant's orchard, but did not know who did it, and had no knowledge that defendant participated in the act, or even knew the fact, is not evidence tending to prove the act of possession, within the requirements of the statute, or the law upon general principles. The instruction of the court below was therefore correct, the judgment legal, and should be affirmed by this Court.

The execution of the writ of replevin, by taking the horse in a public or common range, strengthens the position of the defendant, that plaintiff had no evidence showing possession in defendant at any time within one year preceding, or at any time whatever.

*SCOTT, J., delivered the opinion of the Court.*

Obouchon sued Boon in replevin for a horse; plea, not guilty. On the trial, the plaintiff took a non-suit, and after an unsuccessful motion to set it aside, brought his cause to this Court.

Besides other evidence conducing to show that the horse in dispute was the property of the plaintiff, a witness testified that he was present when the sheriff came to serve the writ of replevin on the defendant; that the defendant claimed the horse, and told the sheriff he would find him in the range. Another witness testified that he knew that the defendant claimed the horse, and that about three weeks before the institution of this suit, he saw the horse tied in the defendant's orchard. After other evidence, the plaintiff closed his case, and the defendant moved the court to give the following instruction, which was done, to which the plaintiff excepted, to-wit: That there is no evidence on the part of the plaintiff that the property in question was ever in the possession of the defendant, Boon, within one year before the commencement of this action, and no evidence of the wrongful taking or detention of the said property by the defendant, and that they must find for the defendant.

Whether the evidence was sufficient to establish the fact that the defendant was ever in possession of the horse, or wrongfully took or detained him, was a question exclusively for the jury. It is clear the tendency of the evidence was to prove these facts, and whether it did or not was a matter with which the court had nothing to do. The instruction was manifestly erroneous, and the other Judges concurring, the judgment will be reversed and the cause remanded.

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*Primm, Taylor & Brown vs. Ransom.*

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PRIMM, TAYLOR & BROWN vs. RANSOM.

One execution cannot be set off against another in the hands of a sheriff, where the sum due on the first execution had been in good faith assigned before the latter execution was delivered to the officer. The delivery of the execution to the officer is to be deemed the time at which the plaintiff becomes entitled to the money due thereon.

APPEAL from St. Louis Circuit Court.

PRIMM & TAYLOR, *for Appellants, insist:*

1. The question submitted to the court below was strictly within its jurisdiction, and the decision one from which an appeal lies to this Court. *Wise vs. Darby*, 9th vol. Mo. Rep. page 131.
2. The only question in this case is, the construction of the second division of the tenth section of the statute entitled Set-Off, Rev. Code, 1845, p. 1006. When was the money due on the second execution?
3. That the money in the second execution was not "*due thereon*" until the same was in fact issued and delivered to the officer; and if such be the meaning of said language, then the court erred, because the money in the first execution was *bona fide* assigned before the second execution issued.

KNOX, *for Appellee, insists:*

1. The statutes of the State of Missouri require the sheriff to set off one execution against another in cases like the present. See Rev. Statute of 1845, title Set-Off, pages 1006-7.
2. Without the statute above referred to, the Circuit Court had the authority to order the sheriff to set off the said executions. See 1st Cowen, page 206, *Cooper vs. Rigdon & Searls*; 8 Cowen, 126, *Ewen vs. Terry*; 8 Mass., 451, *Makepeace vs. Cootes*.

SCOTT, J., *delivered the opinion of the Court.*

In February, 1845, Ransom, the appellee, obtained a judgment in a Justice's Court against Richard Warren. A transcript of the judgment being afterwards filed in the Circuit Court, in December following an execution issued thereon and was placed in the hands of the sheriff. On the 3rd October, 1845, Warren recovered in the Court of Common Pleas a judgment against Ransom, the appellee, which was assigned on the 16th of the month to the appellants, who caused execution to issue thereon on the 14th November following. The appellee was seasonably notified of the assignment to the appellants. On the 12th February, 1846, both of the executions being in the hands of the sheriff, the Circuit Court directed him to set off one against the other, without regard to the interests

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*Bunding vs. Miller.*

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of the appellants, (the assignees of the first execution,) from which they appealed to this Court.

The question in the case arises under the 2nd subdivision or clause of the 10th section of the act respecting set-off. The sheriff being authorized by a preceding section to set off executions against the same parties, that subdivision prohibited it where the sum due on the first execution had been lawfully and in good faith assigned to another before the creditor in the second execution had become entitled to the sum due thereon. The word "thereon," at the end of the subdivision, evidently refers to the sum due on the first execution, and the appellee could not have been entitled to it until the execution was placed in the hands of the sheriff; and as, at that time, it had been lawfully and in good faith assigned away to others, under the law he was not entitled to it. Judge NAPTON concurring, the judgment will be reversed.

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BUNDING vs. MILLER.

The lien of a transcript of a judgment of a Justice of the Peace, filed with the Clerk of the Circuit Court, attaches from the filing of the transcript.

ERROR to St. Louis Circuit Court.

McBRIDE, J., *delivered the opinion of the Court.*

Elizabeth Keesacher having obtained two judgments before a justice of the peace of St. Louis county, against Hiram V. Miller, and not being able to obtain satisfaction thereof by execution from the office of the justice, filed transcripts of her judgments in the Clerk's Office of the Circuit Court on the 8th December, 1845, and immediately sued out executions thereon against the real estate of her debtor, which executions were made returnable to the next April term of the Circuit Court.

John Bunding also having obtained a judgment before a justice of the peace against Hiram V. Miller, and failing to obtain satisfaction of his judgment, by execution issued by the said justice, likewise filed, on the

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*Bunding vs. Miller.*

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8th January, 1846, a transcript of his judgment, in the Clerk's Office of the Circuit Court, and caused an execution to be issued thereon, on the same day, and returnable to the ensuing April term of said court.

The executions of both the above judgment creditors were received by the sheriff on the day of their dates, and were by him levied on the lands of the defendant, Miller, which, being sold, did not produce enough to satisfy the two executions in favor of Elizabeth Keesacher, which first came to the sheriff's hands, and to which he applied the whole proceeds of the sale.

At the April term of the Circuit Court, Bunding filed his motion for a rule against the sheriff, to compel him to apply a part of the proceeds of the sale of Miller's land to the satisfaction of his execution.

The Circuit Court overruled his motion, to which he excepted, and has brought the case here by writ of error.

To sustain the claim of Bunding to a portion of the money realized by the sale of Miller's real estate by the sheriff, we are referred to the latter clause of the third section of the act regulating judgments and decrees, R. C. p. 622, which provides that when two or more judgments are rendered at the same term, as between the parties entitled to such judgments, the lien shall commence on the last day of the term at which they are rendered. This clause of the statute, by its terms, only embraces judgments and decrees obtained in the Circuit Court, and consequently does not apply to the case under consideration, where the judgments were obtained before a justice of the peace, and are regulated exclusively by another and different statute, which declares that the lien of such judgments shall attach from the filing of the transcript. R. C. 1845, p. 659, § 17, 18.

Elizabeth Keesacher's judgments having been obtained one month prior to that of Bunding, her lien attached that much sooner than his, and her execution being the eldest by the same period of time, we cannot see any pretext for his motion to the Circuit Court, and are of opinion that the court decided correctly in overruling the said motion. Its judgment will therefore be affirmed.

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*Reed vs. Vaughn.*

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REED vs. VAUGHN.

In a bill filed by a bankrupt to enjoin a judgment which had been included in his schedule, it is not necessary to shew jurisdiction in the court which granted the discharge. The District Courts of the United States are not courts of *inferior jurisdiction*, whose judgments taken alone are to be disregarded.

APPEAL from St. Louis Court of Common Pleas.

HICKMAN, *for Appellant.*

TODD, *for Appellee, insists:*

1. The bill is bad, because it does not thereby appear that the judgment was not a lien upon the property levied upon and advertised to be sold. Liens upon real property acquired before petition filed, were not impaired by the late Bankrupt Act. See proviso at the close of the 2nd section thereof.

2. The bill does not show jurisdiction in the District Court for the District of Columbia over Reed's case therein. The 7th section of said Bankrupt Act provides that all petitions "shall be had in the District Court within and for the district in which the person supposed to be a bankrupt shall reside or have his place of business at the time when such petition is filed, except where otherwise provided in this act."

The bill nowhere states that, at the time of filing his petition, Reed either had his residence or place of business in the District of Columbia, one or the other of which (no exception being claimed) was necessary for the jurisdiction of the court over his case. 7 J. R., p. 75; 10 J. R. p. 161; 1 Cowen Reps. p. 316; 3 Wend. Reps. p. 247.

3. Reed, if entitled to redress, has remedy at law, by *audita querela* or motion. 1 Cowen Rep. p. 42 and note to that case. He has neglected this, having, since his pretended discharge, suffered writs of execution to be sued out and returned with the money partly made, without objection.— In such cases a court of equity ought not to relieve. 2 Story's Com. on Equity, p. 173, s. 887.

NAPTON, J., *delivered the opinion of the Court.*

This was an application to a Court of Chancery for an injunction against a judgment at law. The suit was originally commenced in the Circuit Court of St. Louis, but removed to the Court of Common Pleas. The grounds upon which the injunction was claimed, were, that the petitioner had, on the 2nd March, 1843, made application to the U. S. District Court at Washington City, for the benefit of the Bankrupt Law, and that, on the 3rd July, 1843, a decree was rendered in his favor and a certificate of discharge duly granted, which he filed as part of his bill; that the judgment against which he sought relief had been included in

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*Pond vs. Butler.*

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his schedule, and that the certificate discharged him from its payment.— A demurrer was filed to this bill, which was sustained, and the only question for our consideration is the sufficiency of the bill.

It seems from the brief filed by the appellee's counsel, that the objection to the bill is, that it does not set forth facts to bring the case within the jurisdiction of the U. S. District Court for the District of Columbia. Several cases are cited from the New York Reports to show that in pleading a discharge under the insolvent laws of that State, it was necessary to set forth facts which would show that the court which gave the discharge had jurisdiction of the case. These adjudications proceeded upon the ground that the courts, which were by the laws of that State invested with authority to grant discharges to insolvent debtors, were courts of inferior jurisdiction. This is not the case with the District Court of the United States, which, though a court of limited, is not a court of inferior jurisdiction, whose judgments taken alone are to be disregarded. *Turner vs. Bank North America*, 4 Dall., 8; 10 Whea. R. 192, *McCormick vs. Sullivan*.

We think the bill sufficient, and that the demurrer should have been overruled.

Judgment reversed and cause remanded.

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POND vs. BUTLER.

Where A. and B. have running accounts, A. having done work, for which B. has made payments, B. cannot set off these payments against an action brought by A. for work done after the payments so made by B.

APPEAL from St. Louis Court of Common Pleas.

Todd, for Appellant, insists :

1. The court erred in allowing to be read in evidence the demand in the case of Mann Butler, sen'r,

First, Because it was not *res adjudicata*;

Second, Because it was between different parties;

Third, Because there was no evidence that the credit allowed on the demand in the other suit



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*Pond vs. Butler.*

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was a part of the set-off claimed in this suit, nor that the claim in the other suit was such as the set-off in this suit was applicable to. The assertion of the attorney is no evidence.

2. The court erred in refusing the first instruction asked for by the defendant. 7 Cowen, 92.

Because, if a father assents to his minor son's earning wages on his own account, the right of action therefor belongs to the minor alone. 7 Cowen's Rep. 92. Of course then, what he received was a proper set-off. Then, in this case, as the defendant proved that the plaintiff did receive and give his own receipts for the moneys charged in the set-off, and as the plaintiff cannot recover more than he has sued for, if the set-off exceeds that, the defendant is entitled to a verdict for such excess under the statute.

3. The court erred in refusing to give the second instruction asked for by the defendant.

See reasons under point 1st.

4. The court erred in giving the instruction it did of its own accord, marked 3rd.

First, Because it assumed the right of action in the father for the wages earned by his son prior to his majority, regardless of the father's evidence to the contrary;

Second, Because there is no evidence (unless the assertion of the plaintiff's attorney be evidence) to show that a portion of the set-off was earned by the plaintiff while a minor, for which the father has given the defendant a credit.

5. The verdict is excessive, because the plaintiff's demand is for only \$21 60; and even if the \$30 of credit given on the father's demand in his suit, read in evidence, be stricken from the defendant's set-off; \$10 still remain, leaving a balance for the plaintiff of only \$11 60, being the verdict, less interest, in the justice's court, yet the verdict and judgment are for \$19 62.

6. The conduct of the appellee deprives him of all favorable consideration, for he sanctioned the original arrangement by his continuing so long under the same after he became of age without objection, and left contrary to said arrangement when he did, without notice or cause; and thereby, as a servant to appellee, in law, he forfeited all claim upon Pond. Also, such conduct tends to prevent apprenticeships, (and which conduct seems rather common in St. Louis, as appears by the evidence of Mr. McKown,) which public policy ought to encourage.

**BATES, for Appellee, insists :**

1. The court committed no error in allowing Mann Butler, jr. to rebut Pond's set-off by reading the record and papers in the case of M. Butler, sr. vs. Pond, in order to show that the payments claimed in the one suit were allowed in the other.

2. The court committed no error in giving or refusing the instructions excepted to.

3. The policy of our law discourages nice and technical exceptions to proceedings in justices' courts.

**SCOTT, J., delivered the opinion of the Court.**

This was a suit begun in a justice's court for services as a carpenter performed by the appellee, and being afterwards taken to the Court of Common Pleas, the appellee, who was plaintiff, recovered judgment.

It appears that the appellee, a short time before he attained his majority, went to work with the appellant for wages, with an understanding that after he became of full age, he would serve an apprenticeship with him, if they could agree on the terms. The appellee continued to work

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*Pond vs. Butler.*

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with the appellant some time after his majority, and for his labor after full age this suit was brought. The appellant gave evidence of payments made for the services of the appellee, from which it appeared that the payments were mostly made before the services for which this suit was brought, were commenced, and endeavored to apply those payments to the appellee's account. The appellee gave in evidence an account filed in a suit by his father against the appellant for the services rendered by appellee before he was of age, on which account there was a credit for most of the payments claimed by appellant. This evidence was objected to by the appellant. The appellant asked the following instructions, which were refused, and to which he excepted, viz: If the jury believe from the evidence that the plaintiff was, by the assent of his father, entitled to his earnings while in the service of the defendant, the set-off proved by the defendant should be allowed against the claim of the plaintiff in this suit, and the plaintiff in this suit cannot recover more than the amount specified in his suit; and if they find the set-off of the defendant to exceed the claim of the plaintiff in this suit, the defendant is entitled to a verdict for such excess. 2. The papers in the case of Mann Butler, the father, against the defendant, offered in evidence by the plaintiff, the jury should disregard as evidence in the case.

We cannot say that the judgment is for the wrong party. It was a matter of indifference whether the father or son was entitled to the compensation for the services rendered before the appellee was of age, as the date of the payments proved by the appellant showed that they could only have been applied to the amount due for those services. If the appellee, by the consent of his father, was entitled to all his earnings, yet, as from the evidence it appeared that a portion of his services had been paid for, it was not necessary to include them in the account on which suit was brought, and his failure to do so did not confer on the appellant a right to apply the payments thus made to a debt due for a portion of services which had never been satisfied. If there is a running account between individuals, and articles are furnished on one side, and payments made on the other, after the account for articles furnished is nearly balanced by payments, and other articles are supplied, but no payment is made, and an action is brought for the price of the articles for which no payment has been received, not including those which were furnished previously, on what principle would a defendant be allowed to use as a set-off or payment the money paid for the articles previously furnished?

*Perrin vs. Wilson and wife.*

The account in the suit by the father against the appellant was not admissible evidence; but as it went to the proof of a fact sufficiently clear before, and which was established by the defendant himself by the dates of his set-off or payments, it cannot be seen how he was prejudiced by it.

The other Judges concurring, the judgment will be affirmed.

## PERRIN vs. WILSON AND WIFE.

1. The law presumes that a minor is supplied by its parent with necessities, so long as the minor continues to live with its parent.
2. A minor cannot become liable for *necessaries* so long as it is supplied with *necessaries* by its parent.
3. Articles of dress and ornament, although such as are generally worn by minors of like condition, are not necessarily *necessaries*.
4. If articles be furnished to a minor while it continues to live with its parent, by a tradesman, it is at his peril—he must shew that they are necessities, or neither the minor nor parent will be liable.

## ERROR to the St. Louis Court of Common Pleas.

*LESLIE, for Plaintiff, insists:*

1. The husband, Lewis J. Wilson, is liable for the debts of his wife, which existed before marriage. A husband's liability for the debts of his wife is an incident to the principal contract, and as such, he cannot avoid answering for the debts of the wife.
2. Was the wife, before and at the time of the marriage, liable for the debt? We think she was. The position assumed before the court below, was, that the wife being an infant at the time of contracting the debt, and the debt having been contracted for necessities furnished, the father alone was responsible.
3. But if the father might have been made liable, it does not follow that the daughter was not.

*CALLAHAN, for Defendant, insists:*

The Court of Common Pleas did not err in overruling the motion for a new trial.

1. Because there was no adequate reason to disturb the verdict. The defendant in error, Wil-

*Perrin vs. Wilson and wife.*

son, was not under any legal liability to the plaintiff in error, Perrin. The *femme* was sole and an infant, under her father's care and protection, when the tinsel, millinery or goods were furnished to her, and their gaudy and costly character, as revealed in the account itself, tends to repel the conclusion that they were necessities. 3 C. & P., 114, Cook vs. Denton, and 2 W. Black. 1325, Bainbridge vs. Pickering. The law will not raise an *implied promise* on the facts of the case, and no *express one* was attempted to be shown. Lord Ellenborough, C. J. in Atkins, *et al.* vs. Banwell, *et al.*; 2 East., 505.

2. Because the writ was not served on the wife; and such omission is fatal in a cause of this particular description; Tidd's Prac., 9, and 1 Chit. Pl. 67, 68; notwithstanding the 20th and 21st sections of the 3rd article of our statute, "Practice at Law," and the 1st, 2nd, 3rd and 4th sections of the act entitled "Contracts and Promises."

3. Besides, the court was not asked to give any instruction, to decide any point of law; and it gave none; it decided none. It is the verdict alone which is complained of; and in the language of the 7th Mo. R., 244, "a new trial would be little else than an appeal from one jury to another." This court has repeatedly decided that in such case the judgment will not be reversed. VonPhul vs. the City of St. Louis, 9 Mo. R., 49; Fugate & Kelly vs. Muir, ib. 355; McEvoy, use, &c. vs. Lane & McCabe, ib. 48; Young vs. Kelly, ib. 50; Vaughn vs. the Bank of Missouri, garnishee, &c. ib. 379; Kilgore vs. Bouic, assignee, &c., ib. 291; Little, *et al.* vs. Nelson, 8 Mo. R. 709; Taylor vs. Russell, 8 Mo. R. 701.

4. And farther, the record does not show that all the evidence given is preserved in the bill of exceptions, while there is nothing in the proceedings to authorize the inference that there was none other; and for this reason, the verdict ought to stand. 5 Mo. R., 51, 110.

*SCOTT, J., delivered the opinion of the Court.*

This was an action for goods sold, begun in a justice's court, and was taken to the Court of Common Pleas, where, on a trial, the defendants obtained a judgment.

The wife of the defendant was a minor in St. Louis, under the care of her father, who was a resident of Louisiana. The articles furnished were dresses, millinery, &c., and were not unsuited to the condition in life of the minor. The father refused to pay the account, and Wilson afterwards intermarrying with the minor, this suit was brought against them jointly.

There is no doubt that a husband is liable for the debts due by the wife before coverture; and there is as little that a father is responsible for necessities furnished to his infant child, and that the infant itself may be liable. But this principle is subject to some important qualifications, founded as well on a regard for the rights of the father, as on policy and sound wisdom. It would be monstrous that a milliner, artist, grocer or merchant, under pretence of furnishing an infant with necessities, should step in between the parent and his child and say what is and what is not necessary for it. The father deems an article unnecessary and refuses to supply it to his child: shall another say that it is necessary and that it shall be furnished? In the case of Bainbridge vs. Pickering, 2 W. Black,

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*Perrin vs. Wilson and wife.*

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1325, it was said by Gould, that if an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes, or other real necessities of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessities; for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom—all that must be left to the discretion of the father or mother. As there is not here any pretence but that the child was decently provided for by the mother, I think we should give no countenance to such persons as inveigle young women into extravagance, under the pretence of furnishing them with necessities, without the previous consent of the parent.

The father is bound to support his children, while they remain a part of his family. Perhaps if he fail to furnish them with clothes and goods necessary for the support of life, or if he cruelly and carelessly turn them out of doors, any one who, under such circumstances, would furnish such necessities, may maintain an action against the father, upon the presumption of an assent on his part. The intendment of law is, that a child lives with its father, and that he performs his duty to his children. *Walling vs. Toll*, 9 John. 140. The tradesman who credits an infant, does it at his peril. He must show affirmatively that the provisions furnished were necessary, and if he give no proof, the verdict must be for the defendant. *Story on Con.*, 40. The term "necessaries" implies that they were furnished under such circumstances as rendered the parent or infant liable. It is not enough to show that they were such things as children in like condition in life are usually supplied with, but it must appear that they were furnished under such a state of circumstances as created an obligation on the parent or infant to pay for them. If, while a child is under the care of a parent, it could subject either itself or its parent to the payment of accounts for articles deemed necessities by an interested tradesman, the control over their children, intrusted by law to parents, and which is so necessary to their own welfare, would be greatly impaired. In this case, there is not only no evidence that the father did not furnish the defendant's wife with necessities, but it appears affirmatively that she was under his care; and being under his care, the presumption is, that she was furnished by him; and under such circumstances, she could not have made herself liable; so long as the parent continues to maintain and support his child, the child cannot become liable for necessities. *Angel vs. McLellan*, 16 Mass., 31.

The other Judges concurring, the judgment below will be affirmed.



*Watson vs. Walsh & Patterson.*

WATSON vs. WALSH & PATTERSON.

1. A declaration containing two counts, one upon a note and the other the common count for money had and received, is not triable at the return term. A motion to continue such case is improper, and it is no error in the court to overrule it.
2. If the party, after such motion is overruled, go into the trial of the cause, and take no exceptions to the trial, the judgment will not be reversed.

APPEAL from the St. Louis Circuit Court.

CASSELBERRY, *for Appellant, insists:*

The only point to be considered is, whether the court below erred or not in refusing to grant the continuance asked for by Watson, at the return term of the writ. We think that the refusal to grant the continuance was erroneous.

GAMBLE & BATES, *for Appellees, insist:*

1. The defendant was not entitled, as to a mere legal right, to a continuance. No statute gives him that right. The 2nd section of the 4th article of the Law of Practice provides for the continuance of such cases *only* as "shall not be otherwise disposed of according to law." R. C., p. 816.

2. Supposing the case entitled to continuance by the *mere force of law*, then the court (without any volunteer and irregular motion of the defendant) would continue it, in due time and manner, when it came up for disposition, in the ordinary calls of the docket.

3. The defendant's motion for a continuance was premature and out of time. He had just amended his own pleadings in a material matter, and the plaintiff had a right, "according to the course and practice of the court, to answer the pleading so amended." R. C., p. 826, sec. 2.

The plaintiff might insist upon the legal and accustomed time to consider of the amended pleadings, and reply, or demur, or move to strike out.

4. The defendant's motion was not only premature, but was irregular and wholly void; for, although the court, by mere force of statute, may continue a cause, in its own time and manner, yet every application by a party for the continuance of a cause shall be accompanied by his affidavit, or the affidavit of some other creditable person, "setting forth the facts upon which the application is founded." R. C., 817, sec. 4. Besides, in *Scogin vs. Hudspeth*, 3 Mo. R., 124, this Court says "motions for a continuance are addressed to the sound discretion of the Circuit Court, and this Court must see that its discretion has been exercised unsoundly before it will reverse a judgment for that cause." Nothing appears in this cause to show that the Circuit Court abused or unsoundly used its discretion.

But, 5. Supposing the defendant really entitled to a continuance, if he had claimed it in proper time and manner, still he was waived all objections by voluntarily going into trial of his cause, when called in its order, nearly four months after his motion, (23rd March.) He then made no objection to trial—waived a jury, and set up no defence.

This is in substance a withdrawal of the former claim of continuance. This Court has sustain-

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*Watson vs. Walsh & Patterson.*

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ed my doctrine in a much stronger case, viz: Defendant demurred to the declaration, no judgment on the demurrer, but afterwards the defendant filed a plea; plaintiff took issue, and on that state of the record this Court *presumed* that the defendant had withdrawn his demurrer. 6 Mo. Rep. 174, Sweeny vs. Milling.

SCOTT, J., *delivered the opinion of the Court.*

The appellant was sued by the appellees in the St. Louis Circuit Court in *assumpsit*. The declaration contained two counts, one on a promissory note and one on a count for money had and received. The writ was served on the appellant personally, more than twenty days before the beginning of the return term. There was no profert made in the declaration of the note sued on, in consequence of which there was a demurrer to the count on the note, which was sustained. An issue was made up on the second count, and the appellee applied for a continuance, which was refused, and judgment was rendered against him at the return term of the writ. The application for the continuance was made on the 2nd December, 1845, and the trial, which was by submission, did not take place until the 23rd March following.

The 7th section of the act regulating the proceeding by petition in debt enacts, that in all common law actions of debt and actions of *assumpsit*, founded on bonds, bills or notes, in the Circuit Court, the defendant, if he shall have been personally served with process twenty days before the return day thereof, shall plead to the merits of the action on or before the second day of the term, and that a trial shall be had at such term unless the suit is continued for good cause.

The declaration contained two counts, one on a note and one on a common count. As there could be but one final judgment in the cause, and as the appellees joined a cause of action, in which the appellant was entitled to a continuance with the count on the note, it is clear they were not entitled to a trial at the return term. It was not in their power to take from the appellee a right to a delay until the second term of the trial of the cause of action contained in the second count, by joining with it in the declaration a cause of action triable at the first term. The appellant cannot be presumed to know that the same cause of action was stated in both counts; and if even it were so, yet as it was unknown to him on which the appellees would proceed, he was entitled to a continuance.

There was no necessity for an application for a continuance. The cause was continued by operation of law. The court properly overruled

*Irwin vs. Milburn, Sheriff.*

the motion. As there was no objection made to the subsequent proceedings on account of their irregularity, and as the error of the court below was not sought to be corrected by motion, the other Judges concurring, the judgment will be affirmed.

**IRWIN vs. MILBURN, SHERIFF.**

1. A sheriff is not entitled to charge a defendant with commission on a debt for which the property of defendant had been attached by the sheriff, the debt having been paid to the plaintiff by defendant before any further proceedings on the attachment.
2. Where, in such case, the sheriff had claimed and been allowed commission by the court, but no exceptions were taken to the opinion of the court, its judgment will be affirmed.

**ERROR to St. Louis Circuit Court.**

*Scott, J., delivered the opinion of the Court.*

The property of Irwin having been seized by an attachment in a suit begun by Ashhurst & Remington against him, the debt was paid to the plaintiffs without any further proceedings in the cause, and thereupon, in addition to his other fees, the sheriff charged half commission on the debt, under the law regulating fees for serving executions. This was allowed him.

The point involved in this case was settled by this Court in the case of *Gordon & Gordon vs. Maupin*, Sheriff of Boone county, at the last January term. It was there held, under somewhat like circumstances, that the sheriff was not entitled to a commission against the defendant. The evidence in this case not having been preserved in the bill of exceptions, and no exceptions having been taken in the court below, the judgment will be affirmed, the other Judges concurring.

*United States vs. Gamble & Bates, garnishees, &c.*

UNITED STATES vs. GAMBLE & BATES, GARNISHEES, &c.

A motion is no part of a record until so made by a bill of exceptions.

ERROR to St. Louis Circuit Court.

GANTT, for Plaintiff, insists:

1. That the judgment on which the suit against Holliday was brought, merged the offence for which he was originally indicted, and debt lies on the judgment against Holliday, *ex contractu*.—United States vs. Dodge, 14 Johnson, 95; Act of Congress 24th September, 1789, ch. 20, § 11; Addison's Reports, U. S. vs. Wolf, 312; Houston vs. Moore, 5 Wheat.; 1st Chitty's Pleadings, 126, 127, 403, 404. And that the jurisdiction of the courts of the several States, in civil actions, in which the United States are plaintiffs, is, in cases not excepted by the letter or spirit of the Judiciary Act, (1 Story's Laws U. S., 57 and following) concurrent with that of the courts of the United States.

2. It may be conceded, without damage to the case of plaintiff in error, that the courts of New York and Kentucky (U. S. vs. Lathrop, 17 Johns 4; 1 Dana, 442) correctly laid down the law in the cases cited, the case at bar being entirely clear of the principle of those decisions. If debt on a bond for the payment of duties can be entertained by a State court, as seems to be conceded, (1 Kent's Com. 401; U. S. vs. Dodge, 14 John., 95; U. S. vs. Lathrop, 17 John., 4) debt will also lie on a judgment for those duties or the penalty for not paying them, and a State court will hold cognizance of the cause by parity of reason.

3. That to refuse jurisdiction in such a case as that at bar, would be to deny all remedy to the United States, and put them in a worse condition than any foreign power, or any foreign or domestic corporation. The Nabob of the Carnatic vs. East India Company, 1 Ves. Jr., 371; 10 Mass., 91; 5 Cow., 550; King of Spain vs. Oliver, Peter's Cir. Ct. Rep. U. S., 276; St. Louis Per. Ins. Co. vs. Cohen, 9 Mo. Rep., 421.

4. The fact that the present action could not have been commenced to any purpose in the U. S. Courts, by reason of defendant's non-residence in Missouri, (12 Peter's, 300; 15 Peter's, 169, 171; 1 Story's Laws U. S., 57, § 11) furnishes a strong reason why the State court should hold cognizance of it. 1 Chitty's Pleadings, 479; 6 East., 600; 5 Mass., 362; 3 Mass., 24.

5. There is no necessity for a bill of exceptions showing that the plaintiffs in error excepted to the ruling of the court below, because,

First. The objections to the jurisdiction of the court, made by the garnishees and by them signed, are, to all intents and purposes, a plea in abatement to the jurisdiction of the court; and this, in form as well as substance, so far as the position of the garnishees on the record allowed, and the judgment of the court is, as if given on demurrer to the plea in abatement, in which case no bill of exceptions is necessary.

Second. This court has decided expressly that "the Supreme Court will take notice of and review the erroneous final judgment of an inferior court, although no motion was made to set aside such judgment, and although no exception was taken to it." Carr & Co. vs. Edwards, 1 Mo. R. 137, quoted in West vs. Miles, 9 Mo. R., 167, where the same principle is decided.

6. That the jurisdiction of the State court does not depend on the question whether or not the process of the U. S. Court could reach the defendant, nor is it to be concluded that, if not, then the State court cannot have jurisdiction, since a State court can at most have concurrent jurisdic-

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*United States vs. Gamble & Bates, garnishees, &c.*


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tion with the U. S. Courts, &c. But that it is to be tested by the inquiry whether the U. States Court has jurisdiction over the matter and the person, supposing them both before the court by legal process.

7. That though one government will not enforce the penal laws of another, nor take notice of the political consequences of its judgments, yet the pecuniary fine imposed by a government becomes a debt which can be enforced elsewhere. And that this is especially the case where the United States asks the aid of the State courts of one of the members of the Federal Union. *Josh. Ward, assignee, &c. vs. Nehemiah Mann, et al.*, decided March term, '46, of Sup. Judicial Court of Mass. See Law Reporter, No. —

8. That the discretion of the court below in holding cognizance of this cause is not an arbitrary thing, to be wantonly exercised or capriciously denied, but that it is governed by the strictest considerations of the duty to which a tribunal for the enforcement of rights and redress of wrongs is subject, from its constitution and nature. Art. 7 of Declaration of Rights of the people of the State of Missouri.

**BATES, for Defendants, insists:**

1. A civil action of debt cannot be maintained upon a criminal sentence. Debt on judgment is classed with actions on contract and is based on an implied agreement to pay, &c. Bl. Com.; 1 Chit. Pl., page 103-4, 126-7; 2 Sel. N. P. 530, and see the forms and notes thereon; 2 Chit. Pl., 482, &c. These, according to Lord Coke, are the lock and key of the common law.

If debt can be brought for the money—part of the punishment—why not *debt in the detinet*, for lashes or imprisonment?

2. But if such action be legally possible, it cannot be maintained by the United States; because, The United States cannot sue except in its own courts. See the Constitution. And, 12 Pet. R., 657, *Rhode Island vs. Massachusetts*, wherein it is declared to be the duty of the Federal Judiciary to decide all cases arising under the constitution and laws.

And again, Congress cannot vest any portion of the judicial power, except in courts ordained and established by itself. *Martin vs. Hunter's lessees*, 1 Wheat. 304; (3 Cond. R. 578); 1 Kent's Com. 395.

Although a foreign prince or nation, being a person in law, may, from necessity, bring an action in our courts, still, the U. S., within the limits of its own jurisdiction, cannot. The United States government is a system perfect in itself, with means and machinery within its own borders, to maintain all its rights and enforce all its remedies. It cannot burden the State courts with its business, nor subject itself to the jealousy and conflict which would arise from such practice.

Our courts cannot give a judgment even for costs against the United States. Its own courts cannot. 8 Pet. R., 163, *United States vs. Ringgold*.

3. But this is a proceeding to enforce the criminal law of the United States, which cannot be done in the State courts. See Judiciary Act, § 11; 1 Story's Laws, p. 57; 1 Kent's Com., pages 395 and following, to 404, new addition, and cases there cited; *Martin vs. Hunter's lessee*, 1 Whe. 304; (3 Cond. R. 578.)

The § 33 of the Judiciary act does indeed provide for the arrest of offenders by State officers; but expressly excludes all proceedings by State officers, beyond examination and commitment.—And even this power has been more than doubted by high authority. Kent's Com., 12; Nile's Register, *Almidde's case*, Judge Bland's opinion at p. 114; Judge Hanson's opinion, p. 231; *Rhode's case*, Judge Chase's opinion, p. 264.

And among the States, the courts of one State will not expound or enforce the criminal law of another State. 2 J. R., 477-9; 2 C. R., 203; 3 Binney, 220; 5 Binney, 617; 3 Dall. 53; *U. S. vs. Lawrence*; and *ib.* in note at p. 370; *Hay'd R.*, 100.

And the same principle universally prevails among foreign nations.



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*United States vs. Gamble & Bates, garnishees, &c.*

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4. But if the U. S. may sue in the State court, and may maintain a civil action on a criminal sentence, still the U. S. cannot maintain this action by *attachment* on the ground that the defendant is non-resident. It cannot have a different or greater remedy in the State courts than in its own courts; at most, the jurisdiction is concurrent; and if so, attachment will not lie, for it will not lie in the Federal courts. See *Toland vs. Sprague*, 12 Pet. R., 300, and *Levy vs. Fitzpatrick*, 15 Pet. R., 167-71.

The Judiciary Act declares that "no civil suit shall be brought in the courts of the U. S. by any original process, in any other district than that whereof the defendant is an inhabitant, or in which he shall be found at the time of serving the writ." And see 11 Pet. R., 25; *McMekin vs. Webb, &c.*, 1 Kent's Com., 282, 302, sec. 14.

The U. S. Circuit Court of Mo. on these authorities quashed 14 writs of attachment vs. *Abraham Barnes*, on the motion of the garnishees, *Ely & Hayes*.

*Scott, J., delivered the opinion of the Court.*

Marshall Holliday was convicted of a crime against the United States and sentenced to imprisonment and to pay a fine. His trial and conviction took place in the Courts of the United States in Louisiana. *Gamble & Bates*, residing in this State, had in their hands moneys belonging to Holliday. A suit, by attachment, was commenced by the U. States against Holliday in the St. Louis Circuit Court, for the purpose of recovering the fine imposed by the court in Louisiana. *Gamble & Bates* being summoned as garnishees, on their motion, the suit was dismissed, and the United States brings the cause to this court. No bill of exceptions was filed in the cause.

It is an invariable presumption of this court that the proceedings of the inferior courts are correct, unless the contrary appears. He who seeks to reverse them must put his finger upon the error committed by them. Although a motion is set out by a clerk in the record, that does not make it a part of it. A clerk cannot make any thing a record which he pleases to write in the order book or see fit to copy into a record.— A motion is no part of the record, and it can only be made so by incorporating it into a bill of exceptions. This court, then, cannot notice the motion in this cause, as it was not preserved in a bill of exceptions. The presumption, then, must prevail that the judgment of the court below is correct. The other Judges concurring, the judgment will be affirmed.

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*Alexander vs. Schreiber, use of, &c.*

ALEXANDER vs. SCHREIBER, USE OF, &c.

1. The covenants implied by the words "grant, bargain and sell," in a deed of conveyance, under our statute, are separate and independent of each other.
2. A general warranty is only limited by a special, where the two are inconsistent.

APPEAL from St. Louis Circuit Court.

GANTT & HAMILTON, *for Appellant, insist:*

1. That admitting the words of the statute to have the force of a general covenant of seisin by indefeasible title, the existence of an outstanding incumbrance is no breach before foreclosure or payment. 16 Johns., 254; 7 Johns., 380, 381; 5 Pickering, 217; 7 Johns., 471; 11 Johns., 538; Doug., 610; 2 Burr, 979.

2. Oyer being given, it was manifest that the deed contained an *express* covenant to warrant and defend. This express covenant abrogated all implied covenants. 11 Johns., 122; 2 Caine's R., 192; 2 Bos. & P., 26; part IV of Coke's Rep., 80, 86; Kent vs. Welch, 7 Johns., 258; 4 Dallas, Benden vs. Fromberger, 440. (This case is directly in point, being upon a similar statute with ours.)

3. That the notice of special matter filed with the general issue is in every respect similar to a plea alleging the facts whereof notice is given. To sustain a motion to strike it out, therefore, was equivalent to sustaining a demurrer to a plea alleging the same facts. But the facts stated in the notice were such as constituted a good defence to the action, and defendant should have been permitted to give evidence thereof. See 4 Dall., 438, 440; 2 Wend., 517; as to the first point.—As to the second, see 9 Cow., 271; 2 John. 595; Pemberton vs. Staples, 6 Mo.R., 59; 16 John. R., 254, 128; 7 John., 380, 381; 5 Pickering, 217; 4 Mass., 627. The title acquired by Alexander before the commencement of the suit, was complete, and vested in Schreiber by way of estoppel. 9 Cow., 271; Rev. Co. of Mo. for 1835, page 119, § 3.

4. When, upon demurrer to the pleas of defendant, after oyer given, the whole record was before the court, it became manifest that instead of a general and express covenant of seisin, the grantor had (leaving out of view for the present the question of the abrogation of this implied covenant by that which was expressed) only covenanted against the defeasibility of his estate by acts or incumbrances done or suffered by him or those claiming under him. See the 4th vol. of Kent's Com., 473, 474; Gratz vs. Ewalt, 2 Binney, 95; 4 Dallas, 440, and see also the statute of 1835 of Mo., wherein if the first covenant or covenant of seisin indefeasible, &c. were a *general* covenant, the second or the covenant against incumbrances by grantor, &c., would have nothing to operate upon.

PRIMM & TAYLOR, *for Appellee, insist:*

1. That the words of conveyance used in the deed from Alexander to Schreiber are *express* covenants, not *implied* covenants.

2. That one of these covenants is that Alexander, at the time of the execution of that deed, was seized of an *indefeasible* estate in *fee simple* of the lots in question.

*Alexander vs. Schreiber, use of, &c.*

3. That a grantee in a deed containing such words of conveyance, can, in a suit against the grantor, declare in *express words* that the grantor covenanted that he was seized of an *indefeasible estate*, &c. Rev. Laws of 1835, pp. 119 and 120, sec. 7.

4. That such covenant can be broken, the very instant it is made, and, in the present case, was so broken, giving an immediate right of action to Schreiber, and that, too, without waiting for an eviction. *Greenby vs. Wilcocks*, 2 J. R., p. 1; *Hamilton vs. Wilson*, 4 J. R., p. 72; *Abbott vs. Allen*, 14 J. R., p. 248; *Lott vs. Thomas*, 1 Pennington's Rep., p. 407; *Chapman vs. Holmes*, 5 Halsted Rep., p. 20; *Stewart & Fine vs. Drake*, 4 Halsted, p. 139.

5. That such a covenantee can bring his action, although he may never have been disturbed or molested in his possession, and the vendor cannot shelter himself under a title acquired subsequently to the bringing of the action. *Morris vs. Phelps*, 5 J. R., 49.

6. That the covenant of general warranty contained in the deed from Alexander to Schreiber cannot control the *express* covenants, which the words "*grant, bargain and sell*," used in that deed convey, but must be auxiliary to those covenants. *Simonds vs. Beauchamp*, 1 Mo. Rep., 420, before cited. Two warranties made by and to the same persons and in the same instrument, the one express, the other implied, may stand together. *Burton on Real Property*, above cited, p. 186.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of covenant upon a conveyance of some lots in St. Louis, in which the words "*grant, bargain and sell*" were used, as well as the usual covenant of general warranty. The statutory covenant contained in the words "*grant, bargain and sell*" was declared on as a covenant of seizin of an indefeasible estate in fee simple against all the world, and a breach of this covenant is alleged by reason of an unsatisfied mortgage upon the lots conveyed at the time of the conveyance.—The plaintiff, upon the trial, obtained a verdict, and had a judgment for the purchase money of the lots, with interest, &c. A motion in arrest of judgment was made and overruled.

The only question arising on the record, although others have been discussed at the bar, is upon the construction which the Circuit Court gave to the 24th section of the act concerning conveyances. Rev. Co. '45, p. 221. That section, as it now stands in the revision of 1845, declares that the words "*grant, bargain and sell*" shall be construed to be the following express covenants, unless restrained by express terms:—"First, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate in fee simple in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person under him; third, for further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns." These covenants, the act declares, may be

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*Alexander vs. Schreiber, use of, &c.*

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sued upon in the same manner as though they were expressly inserted in the conveyance.

The first act on this subject in our statute book was passed in 1804 by the Governor and Judges of the Indiana Territory. That act declares that "in all deeds conveying an estate of inheritance, the words "grant, bargain and sell" shall be adjudged an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, (except the rents and services that may be reserved,) as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed." That act further declared, "that in any action upon such covenant, the breaches might be assigned as if they were expressly inserted."

In the revision of 1825, the law on this subject was this: "It is enacted that the words "grant, bargain and sell" shall be adjudged express covenants to the bargainee or grantee, his heirs and assigns, for the bargainor or grantor, for himself, his heirs, executors and administrators, that the bargainor or grantor was, at the time of the execution of such deed, seized of an indefeasible estate in fee simple in and to the lands, tenements and hereditaments thereby granted, bargained and sold, and that the same was then free from incumbrances done or suffered from the bargainor or grantor, his heirs and assigns, and all claiming under him; and also for further assurance thereof to be made by the bargainor, his heirs and assigns, unless the same be restrained," &c.

It is at least curious, if it be not instructive, to notice the mutations which this provision has undergone. It is not easy to say whether these changes have been the result of accident, mistake or design.

The act of 1804 is identical in terms with the statute of Pennsylvania of 1715, which latter statute is obviously borrowed from the 30th section of the Statute 6 Anne, c. 35. The Pennsylvania statute has been construed as limiting the covenant of seizin to the acts of the grantor and those claiming under him. *Lessee of Gratz vs. Ewalt*. In Alabama a similar construction was given to a similar statute. *Roebuck vs. Dupuy*, 2 Ala. R., 538.

It will be observed that the act we are now called upon to construe is essentially different from the act of 1804. The statute now in force, and which has been in force since the revision of 1825, with slight alterations, declares that the covenants therein specified shall be considered as express covenants, and as though they were in terms inserted in the

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deed. The only question, then, which can be raised upon the phraseology of this statute is, whether the second covenant therein specified, which is against incumbrance done or suffered by the grantor, must be construed to limit the first and third covenants, which are unlimited in their terms.

In the case of *Browning vs. Wright* (2 Bos. & Pull., 14) there was a special warranty against the acts of the grantor and his heirs, which was followed by a covenant that the grantor, notwithstanding any thing by him done to the contrary, was lawfully and absolutely seized of the land conveyed; and a further covenant that he had good right, full power and authority to convey *in manner aforesaid*. Lord Elson considered the question in that case to be, not whether a special covenant would restrain a general one, but whether the covenant of good right and title to convey, was in fact a special or general covenant. He therefore relied upon the words "*in manner aforesaid*," to show that this covenant was in fact limited by the expressions used in the preceding covenant, "for and notwithstanding any thing by him done to the contrary," and held the covenant for good right and title to convey as a special covenant against the acts of the grantor alone.

The case of *Nevins vs. Munns*, (3 Lev. 46) cited in the argument of the case of *Browning vs. Wright*, seems to have been determined on a similar principle. In that case it is stated there were four covenants; first, for seisin in fee; second, for right to convey; third, against incumbrances; and fourth, for quiet enjoyment. The first, third and fourth were expressly restrained to the acts of the grantor, his father and grandfather, and the second was unlimited. Three of the judges, in opposition to North, C. J., held that the first and second covenants, though distinct and several, were synonymous; and therefore, as the grantor had first covenanted against his own acts, it could not be intended that he should immediately afterwards, in a covenant to the same effect, covenant against all the world.

In *Hepse vs. Stevenson*, (3 Bos. & Pull., 565) this subject was much discussed, and Lord Alvanly considered the result of the cases to be, that however general the words of a covenant might be, if standing alone, yet if, from other covenants in the same deed, it was plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they imported, the court would limit the operation of the general words. But because a covenant was unnecessary, it was not therefore considered inconsistent. So that in that case where there was a covenant that the defendant had good right, full power and



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absolute authority to convey, and also that he had not, by any means directly or indirectly, forfeited any right or authority he ever had or might have had over the property in question, it was held that the former covenant was not restrained by the latter.

So, in *Gainesford vs. Griffeth* (1 Saun., 59) there was an assignment of a lease, in which it was covenanted that it was then a good and indefeasible lease, and that the assignee should quietly enjoy the land, &c., during the residue of the term, without any let or disturbance from the assignor, his executors, &c.; and it was held that the general covenant of a good and indefeasible lease was not restrained by the covenant for quiet enjoyment, which was restricted to acts of the covenantor.

In *Smith vs. Compton and others*, a case decided in 1832, (3 Barn. & Ald., 189) an indenture was made reciting a power in the covenantor to convey the land to such uses as he should designate, and the covenants were that the said power to appoint was then in full force and unexecuted; and also that the covenantor then had in himself good right, title, power and authority to limit and appoint, and to grant, bargain, sell, &c. the premises to the uses designated; and further, that the premises should be held and enjoyed to the said uses without the let or interruption of said covenantor or any claiming under or in trust for him, and also for further assurance by the said covenantor and all so claiming. The court held that the second covenant was absolute for good title against all persons, and not qualified by reference to the other covenants. This opinion was chiefly placed on the ground that there were no words, either in the second covenant itself or in the preceding or subsequent ones, to connect it with them. Lord Tenderden said, "there is, with one exception, (alluding to the case of *Milner vs. Horton*, McClel., 647) no case mentioned where a general covenant has been held to be qualified by others, unless in some way connected with them."

In *Howell vs. Richards*, (11 East., 633) there were several covenants in a deed of release, first, that for and notwithstanding any act by them or any of them done to the contrary, they had good title to convey, &c; second, that they, or some or one of them, for, and notwithstanding any such matter or thing as aforesaid, had good right to full power to grant, &c.; *third, and likewise*, that the releasee should peaceably and quietly enter, hold and enjoy the premises granted without the lawful let or disturbance of the releasors or their heirs or assigns, *or for or by any other person or persons whatsoever*. It was held that the generality of the covenant, for quiet enjoyment, was not restrained to the acts of the re-

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leasors by the qualified covenants for good title and right to convey, for and notwithstanding any act done by the releasors to the contrary. Lord Ellenborough remarked, that the covenant for quiet enjoyment was materially different from the covenants for title. An eviction is necessary to entitle the covenantee to an indemnity in case of a breach of the former covenant, and against this, a party may be willing to covenant, whether it arises from an act of his own or that of a stranger, when, at the same time, he may not covenant to stipulate for a perfect and indefeasible title. "He may suspect," says the C. J., "or even know, that his title is in strictness of law in some degree imperfect, but he may, at the same time, know that it has not become so by any act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death or the like; but those imperfections, though cured so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants, might not require the same qualification in the other of them; affected as it is by different considerations, and addressed to a different object.

In *Benden vs. Fromenger*, (4 Dall. R., 436) the deed in question contained the words "grant, bargain and sell," which, in Pennsylvania, imply a covenant only against the acts of the grantor; also, a covenant that the grantor was seized of a good estate in fee simple, subject to no incumbrances but a certain ground rent, and a covenant of special warranty. The question was whether the special warranty restrained and limited the general covenant, and the court held that it did not. *Tilghman*, C. J., said, "it is certain that the special warranty and more is included in the general one. It is an inaccurate mode of conveyancing, but there is no absurdity or contradiction in making one covenant against yourself and your heirs, and another against all mankind."

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*The State vs. Fortune & Hannan.*

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In *Funk vs. Ex'rs of Bechtoll*, (11 Serg. & R., 109) a somewhat similar question arose. This was an action of covenant upon the covenant implied by the words "grant, bargain and sell"—there being in the same deed a covenant of special warranty—and it was held that the covenant of special warranty did not restrain the implied covenants.

It is apparent from these cases, to which we have briefly referred, that whilst it is conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand. A covenant is to be construed most strongly against the covenantor, and in giving effect to the intention of the parties to an instrument of conveyance, the courts have kept this principle in view. Where the particular covenants and the general covenants are entirely independent of each other, and of a different character, they will all stand. The statute enumerates the three covenants which the words "grant, bargain and sell" are declared to imply, as distinct and independent covenants. The second may be superfluous, but it does not therefore limit the first, which is independent of and not inconsistent with it.

The other Judges concurring, the judgment is affirmed.

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THE STATE vs. FORTUNE & HANNAN.

If an indictment be quashed upon motion, exceptions must be taken to the judgment of the court, to enable the Supreme Court to consider the judgment.

ERROR to St. Louis Criminal Court.

SCOTT, J., *delivered the opinion of the Court.*

This was an indictment against the defendant for keeping grocery without license. On motion, the indictment was quashed; and there being no bill of exceptions preserving the motion, the judgment must be affirmed, the other Judges concurring.

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*Collier vs. Gamble, use of McCabe, &c.*

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## COLLIER vs. GAMBLE, USE OF MCCABE, &amp;c.

1. The only covenant implied by our statute from the words "grant, bargain and sell," which runs with the land, is the covenant for further assurance. The word "assigns," as used in the statute, is limited to that covenant.
2. An action cannot be brought in the name of an assignee for the breach of the other covenants.
3. The statutory covenant being not simply a covenant of seizin, but of seizin of an indefeasible estate in fee simple, the measure of damages is not in all cases the purchase money with interest. When the vendor was actually seized—but of a defeasible estate—the damages should be merely nominal, until the estate has been actually defeated.

## APPEAL from St. Louis Court of Common Pleas.

*BATES, for Appellant, insists:*

1. The demurrers to the pleas in the court below, were all wrong, and ought, every one of them, to have been overruled.
2. The receipted account current between Collier and Gamble was improper and irrelevant testimony, and ought to have been rejected.
3. The exclusion from the jury of the assignment of the covenants sued on, by Gamble to Mrs. Lawless's trustee, was erroneous.
4. The instruction volunteered by the court to the jury was illegal and wrong.
5. The instruction moved by the defendant was legal and proper and ought to have been given.
6. In view of the manifold errors of law, and fact apparent on this record, the verdict ought to have been set aside and a new trial granted.

*HAMILTON, for Appellee, insists:*

In this case, we submit that the only question necessary to be discussed, arises upon the demurrer to the second plea.

The breach is, that the defendant was not seized of an indefeasible estate of inheritance in fee simple. This plea is that he was seized of an indefeasible estate of inheritance in fee simple.

As the recent act of the Legislature seems to have done away with all causes of special demurrer, (except those for duplicity, for the omission to make profert when necessary, which are now converted into substantial defects,) we do not see how we can hold this judgment.

*NAPTON, J., delivered the opinion of the Court.*

This was an action of covenant brought by Gamble, to the use of McCabe, trustee of Virginia Lawless. The declaration assigned a breach

*Collier vs. Gamble, use of McCabe, &c.*

of the covenant of seisin created by the words "grant, bargain and sell," in a deed from George Collier, the defendant, to Hamilton R. Gamble, the plaintiff, made on the 8th Nov., 1834, and conveying a tract of land in St. Louis, containing about twenty-four acres. Defendant pleaded, 1st, *non est factum*; 2nd, that defendant was seized of an indefeasible estate in fee simple, &c. at the time, &c.; 3rd, that the plaintiff had conveyed to one Mills, with covenant of general warranty; and that said Mills, and every one claiming under him, had ever since been in peaceable and undisturbed possession; and said plaintiff had never been compelled to pay any damages, by reason of any disturbance to said Mills, &c., or any defect of title, &c. To the two last pleas, plaintiff demurred, and the demurrer was sustained. Defendant then, by leave of court, filed an additional plea, to wit: that at the time, &c., he was seized of an indefeasible estate in fee simple; and that he, at the same time, was so seized in virtue of a valid conveyance of the said lands from one McAllister and wife, who were, at the time of making the conveyance, the lawful owners and possessors of said land, &c. A demurrer to the additional plea was also sustained.

It may be stated here, that these two actions, originally brought on two deeds from Collier to Gamble, and after the pleadings in the two actions were made up, being precisely the same in each, they were, by order of the court, consolidated. The plaintiff gave in evidence two deeds from Collier and wife to Gamble, dated 29th September, 1831, and the 8th November, 1834, for some lands adjoining St. Louis. The consideration of the one was \$800, and the other \$1838. The plaintiff also gave in evidence an account current between Collier and Gamble, showing the receipt of the purchase money by the former. It was admitted that Gamble had expended \$4500 in improvements, after his purchase from Collier.

The defendant gave in evidence a deed from Gamble to Mills for this land, in consideration of \$12,000, containing a covenant of general warranty by Gamble. It was admitted by the plaintiff, that ever since said purchase by Mills, he, and those claiming under him, had held undisputed possession of the land conveyed.

Defendant then offered in evidence the following paper: "Know all men by these presents, that whereas, George Collier and wife, by two deeds, one dated 29th September, 1831, and the other 8th November, 1834, conveyed to H. R. Gamble several portions of land, which, together, form one tract of forty acres, bounded, &c.; and the said Collier, by said deeds,



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covenanted with the said Gamble for the title to said (land:) and whereas, the said land is embraced in a tract of 350 arpens claimed by the heirs of Major Amos Stoddard, deceased, which claim of the heirs of said Stoddard is adverse to the title conveyed by said Collier to said Gamble: and whereas, the heirs of said Stoddard have conveyed to Luke Edward Lawless one undivided fifth part of said tract of 350 arpens, and the said Lawless has conveyed said undivided fifth part of said tract of 350 arpens to Gamble, now therefore, in consideration of the premises, the said Gamble does, by these presents, assign and transfer unto Edmund H. McCabe, in trust for Mrs. Virginia Lawless, all recourse which he is entitled to against the said Collier, upon the covenants, express or implied, in the said two deeds, if the title held under and derived from the said Major Amos Stoddard shall prove to be a better title to said land than that which was conveyed to said Gamble by said Collier. And the said Gamble, by these presents, gives to the said McCabe, trustee as aforesaid, full power and authority to use his name in any proceeding or suit which may be necessary to enforce the claim against the said Collier, if the said title under the said Stoddard shall prove to be the better title; and any recovery in said suit or proceeding shall be for the benefit of the said Virginia Lawless. In testimony whereof, the said Hamilton R. Gamble has hereto set his hand and seal this 16th March, 1842. H. R. Gamble. *Seal.*" At the foot of this writing, was a statement by Collier consenting to be held responsible to McCabe on his covenant to Gamble, as he would have been to Gamble. The admission of this document, which was produced by a *subpoena duces tecum* from L. E. Lawless, was objected to by the plaintiff, and it was excluded by the court.

The court instructed the jury that the measure of damages was the consideration money, with interest. The court was requested by the defendant to instruct the jury, that if the plaintiff had voluntarily placed himself in such situation that he could not convey back to the defendant the land conveyed to him by the deeds containing the covenants sued on, he could not recover the whole consideration money, with interest, &c. But the court refused to give this instruction.

The plaintiff had a verdict and judgment for \$4,628 32. A motion for a new trial was made and overruled, and the several opinions of the Court of Common Pleas excepted to.

1. The demurrer to the second plea was improperly sustained. The breach assigned in the declaration was, that the defendant was not seized of an indefeasible estate in fee simple, and the plea avers that he was

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so seized. If the breach be well assigned, the plea must be good.— Whether the assignment of the breach be sufficient, will depend upon the character of the covenant, about which we shall speak presently.— If the covenant be a mere covenant of seisin, the breach is well enough; but if the covenant be not only a covenant of seisin, but in effect a covenant against incumbrances, there must then be a specific allegation of an incumbrance or paramount title. 2 Kent Com., 1st ed., 466.

2. The third plea presents the question whether our statutory covenant of seisin is merely a personal covenant, as it was understood to be at common law, or is to be construed as a covenant real, running with the land. The use of the word “assigns,” in the statute, is relied on as a proof that the Legislature, in this respect, designed to alter the common law. The act says, that the words “grant, bargain and sell” shall be construed to mean certain covenants therein specified on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns. These covenants are, first, of seisin, &c.; second, against incumbrances suffered by the grantor; and, third, for further assurance. The two first, are, by the rules of the common law, personal covenants, and are broken, if broken at all, the moment they are made. From their very nature, they are incapable of future violation. As a consequence of this, they did not run with the land, but the remedy upon them being complete, so soon as they were made, was confined to the grantee and his representatives. The third covenant mentioned in our statute, (that for further assurance,) though not strictly a covenant real, at common law, is a covenant running with the land, like those for general warranty and quiet enjoyment.

It will not escape the observation of any one who examines the mutations which this provision of our statute has undergone, since its first introduction in 1804, that these changes have been material, both in form and substance. A section which, in 1804, was designed to provide, and no doubt did provide, a simple covenant against incumbrances suffered by the grantor, has been gradually, and, we must presume, intentionally, branched into two or three distinct covenants. At first, we had a covenant of seisin of an indefeasible estate in fee simple, freed from incumbrance suffered by the grantor, which only amounts to a covenant against such incumbrances as the grantor himself had made upon the estate conveyed. By slight alterations in the language, and very considerable changes in the punctuation, we have now from this root three branches; first a covenant of seisin generally; second, a covenant of seisin of an inde-

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feasible estate, which embraces the former; and, third, a covenant against particular incumbrances. The covenant against encumbrances suffered by the grantor, is apparently superfluous; but we may at least infer from these various changes, however unscientifically made, that the Legislature designed to make "assurance doubly sure!"

The words "heirs and assigns" have reference to all three covenants specified in the statute; and, as one of them, the covenant for further assurance was a covenant running with the land, it was proper to use the word "assigns" when speaking of those who would be entitled to the benefit of this covenant. Its application, however, need not be extended to the two covenants of seisin and for freedom from incumbrances. There is nothing in the grammatical construction of the sentence which requires such an interpretation. It is not reasonable to suppose that an attempt to change the settled construction of a covenant which had been used by conveyances for centuries, would be made in so obscure and indirect a method.

It may be observed, that the words "heirs and assigns," as well as the terms "heirs, executors and assigns," used by conveyances, and when found in our statute book, are usually intended to designate the individual who is supposed to *represent* the party interested, whether he be heir, or executor, or assign. Though all are named, only one is intended in each specified case. Thus, where a covenant is made with a man, his heirs, executors and assigns, if there be a breach in the time of the heir, he must bring the action and not the executor.—*Smith vs. Simonds*, Comb, 64. And where there was a covenant for quiet enjoyment, and the heirs and assigns only were named, it was still held that the executor must bring the action for a breach of the covenant occurring during the life time of the testator. *Lucy vs. Levington*, 1 Vent. 175; *Chapman vs. Darlton*, Plow., 284.

The case of *Kingdon vs. Nottle*, (1 Maull & Selw., 355; 4 M. & Selw. 53) has been supposed to maintain a different doctrine from the one generally received in this country, in relation to the construction of a covenant of seisin. In that case, the covenant was for a good title to convey, and the Court of K. B. held that the executor could not recover upon a breach of this covenant, inasmuch as the testator had sustained no damage in his lifetime. This proceeded upon the idea entertained by the court that there was a *continuous* breach from the time the covenant was made until the eviction by paramount title took place, and as the latter occurred after the death of the covenantee, his heir was the pro-

*Collier vs. Gamble, use of McCabe, &c.*

per person to sue. Chancellor Kent thinks the reasoning upon which the court based its opinion too refined to be correct; (4 Kent C., 459) and and it is at least certain that the entire current of authorities in the United States is adverse to this decision.

We shall conclude, therefore, that there is nothing in the phraseology of our statute which would authorize the covenant of seisin created by the words "grant, bargain and sell," to be regarded as a covenant running with the land, and that the word "assigns," used in the act, may be confined in its operation to the covenant for further assurance.

3. It follows, from the position we have above assumed, that the right to sue for a breach of the covenant of seisin is a mere chose in action, and therefore not assignable so as to authorize an action in the name of the assignee. An assignment of a covenant is not within our statute, which requires assignees to sue in their own name. *Thomas vs. Coxe*, 6 Mo. R., 506. This suit was therefore properly brought in the name of Gamble.

4. The Court of Common Pleas considered the measure of damages to be the purchase money and interest. This is the well established rule in breaches of the covenant of seisin. *Marston vs. Hobbs*, 2 Mass. R., 439; *Bickford vs. Page*, ib., 455; *Caswell vs. Wendell*, 4 Mass. R., 188; *Staats vs. Teneyck*, 3 Caine's R., 111; *Waldo vs. Long*, 7 John. R., 173; *Bender vs. Fromberger*, 4 Dall., 441; 4 Kent Com., 462. This rule has been adopted with the qualification that where the title to part only of the land has failed, the damages will be restricted to the part lost. *Morris vs. Phelps*, 5 John. R., 49. But the covenant which our statute declares to result from the words "grant, bargain and sell," is not a mere covenant of seisin. The latter is only broken when the grantor is not seized, and consequently no estate passes. In such cases, the only controversy which could arise in relation to the rule of damages, would be whether the actual value of the premises, at the time of bringing the action, or the value agreed upon by the parties at the time of the conveyance, should be the standard by which the jury should be guided. It would be manifest that, as no land passed by the deed, the grantee should at least get back all he had paid. But the covenant of seisin mentioned in our statute, is a covenant not only that the grantor is seized, but that he is seized of an *indefeasible* estate in fee simple. This covenant may be broken, where the grantor is seized, but is only seized of a *defeasible* estate. In this respect, it resembles the covenant against incumbrances. The existence of a paramount title, is a breach of our

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statutory covenant; it is not necessarily so, if mere covenant of seisin. These covenants, then, being essentially different, the rule of damages must be different. The existence of a paramount title, whether it has been asserted or not, is a breach of the statutory covenant; and if, for such breach, the grantee is permitted to recover the consideration money and interest, he may get back the purchase money and retain possession of the land, under a title which is defeasible, but which may in fact never be defeated. In such cases, the reasonable rule is to recover nominal damages only, until the estate conveyed is defeated, or the right to defeat it has been extinguished. *Prescott vs. Truman*, 4 Mass. R., 627; *Wyman vs. Ballard*, 12 Mass. R., 302. This avoids the manifest injustice of permitting the plaintiff to recover the value of the land, and at the same time retain possession under a title which may never be disturbed, or whose defects may be remedied by the payment of an inconsiderable sum. It is the rule which prevails in the construction of covenants against incumbrances, and our statutory covenant of seisin, is in fact a covenant against incumbrances, as well as of seisin.

The other Judges concurring, the judgment is reversed, and the cause remanded.

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**SHELTON vs. PEASE.**

1. A transfer of property, in contemplation of bankruptcy, to give a preference to one creditor over the others, is a fraud upon the bankrupt act, and may be pleaded in bar of a certificate of discharge under that act.
2. In such plea, it is not necessary to set out the property so conveyed, nor is it necessary to set out the names of the nominal parties to the instrument of conveyance; it is sufficient to set out the names of those beneficially interested.
3. Failure to give notice to a creditor will not vitiate a certificate of discharge.
4. A discharge under the Bankrupt Act of 1841, releases the bankrupt from all claims or demands against him, due or to become due, contingent or certain.
5. Where a deed of conveyance, containing the words "grant, bargain and sell," recites a mortgage existing at the time, on the property conveyed, and contains a special covenant "that the grantor will forever warrant and defend the premises conveyed, against all persons lawfully claiming the same in law or equity, and against all titles, liens, and incumbrances



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whatever, and particularly against the mortgage above described," the general covenant implied by the words "grant, bargain and sell," is restrained by the special covenant.

6. Such special covenant is not a covenant to pay the mortgage debt.
7. A mere payment of money by the purchaser to buy in an incumbrance, is no breach of this covenant, nor of a covenant of general warranty or of quiet enjoyment. There must be an eviction, or something equivalent thereto, to constitute a breach of these covenants.
8. A covenant against incumbrances is broken by the existence of an incumbrance at the making of the deed. The breach must set out the particular incumbrance relied on.

## APPEAL from St. Louis Circuit Court.

*Statement of the Case adopted by the Court:*

This was an action of covenant on a deed poll, bearing date 1st June, 1839, whereby it is witnessed that the defendant and wife, for a money consideration expressed, *grant, bargain and sell* to the plaintiff a lot in the city of St. Louis, particularly described, *on which lot of ground there is a mortgage executed by the grantors to Charles S. E. Languemare, dated 17th August, 1837, recorded in the Recorder's office in book R, No. 2, page 237, to secure to the said Languemare the payment of \$5,000, with interest at the rate of six per cent. per annum, payable semi-annually—the one half of the said sum of \$5,000 payable in five years, and the other half in six years from the date of the mortgage;* to have and to hold the said lot of ground, and all the rights, privileges, &c., unto him the said John G. Shelton, his heirs and assigns forever. And the said Joseph S. Pease, for himself, his heirs, &c., *doth covenant with the said John G. Shelton, his heirs and assigns, against all persons lawfully claiming or to claim the same, in law or equity, and against all titles, liens and incumbrances whatsoever, and particularly against the mortgage above described to warrant and defend the premises forever.*

The original declaration sets out the substance of the deed, recitals and covenants, and assigns as breaches,

1st. That the defendant hath not defended the premises conveyed to the plaintiff against the said mortgage, but has wholly neglected and refused so to do; and by means thereof, the plaintiff was forced and obliged to pay, lay out and expend, and did pay, lay out and expend, \$1,432 20 towards the satisfaction and discharge of the mortgage.

2nd. That the lot conveyed was not, at the time of the conveyance, free from incumbrances suffered by the defendant, by means whereof the plaintiff was obliged to pay, and did pay, in and about discharging incumbrances on the lot, \$—

The defendant pleaded to the first breach,

1st. That the plaintiff did not necessarily pay said sum of money in the breach mentioned, or any part thereof, towards the satisfaction and discharge of said mortgage.

2nd. That the defendant did defend the premises against the mortgage.

3rd. A discharge of the defendant as a bankrupt.

To the second breach the defendant demurred generally. The plaintiff took issue on the first and second pleas, and demurred generally to the third. The court sustained the demurrer of defendant to the second breach, and overruled that of plaintiff to third plea—but no judgment was rendered. The plaintiff having asked and obtained leave to amend his declaration, an amended declaration was accordingly filed—upon which, with pleas thereto, the case is now before the Supreme Court.

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The amended declaration sets out the deed of the defendant in *hæc verba*, and then avers that by the said deed it was covenanted that the defendant would pay the said mortgage debt and interest, as the same should become due, according to the tenor and effect of said mortgage: that he would warrant and defend the premises conveyed to the plaintiff, against the mortgage—that the lot conveyed was, at the time of the conveyance, free from incumbrances suffered by the defendant—and assigns, as breaches, that the defendant did not pay the said mortgage debt and interest, as the same became due, but neglects and refuses to do so, and the plaintiff paid \$1,432 20 towards the satisfaction and discharge of the mortgage.

2nd. That the defendant hath not warranted and defended the premises against the mortgage, but has neglected and refused to do so; and by means thereof, the plaintiff was obliged to pay, and did necessarily pay, \$1,500 in discharge of the mortgage.

3rd. That the lot was not, at the time of the conveyance, free from incumbrances suffered by the defendant, and by means thereof, the plaintiff was obliged to pay, and did necessarily pay, a large sum of money in discharging incumbrances to which the lot was subject at the time of the execution of the deed, and which had been suffered by the defendant. The defendant pleaded six pleas to the amended declaration; the third, which is the only one involved in the judgment, is to the whole declaration, and is a formal plea of a discharge under the Bankrupt Law of the United States, upon a petition filed after the making the deed, and a formal decree thereon before the commencement of the suit, discharging the defendant from all debts owing by him at the time of filing his petition.

The plaintiff filed three replications to this plea:

1st. The first alleges that the defendant heretofore, to wit: on the first August, 1842, made a transfer of property, in contemplation of bankruptcy, and for the purpose of giving a preference to a creditor of said defendant, over the general creditors of the defendant.

2nd. That the defendant heretofore, to-wit: on the first August, 1842, made a transfer of property, in contemplation of bankruptcy, and for the purpose of giving a preference to Richard S. Tilden, L. B. Shaw and Mary Brown, over the general creditors of the defendant, with an avowment that on the day and year last aforesaid, said Tilden, Shaw and Brown, as purchasers from the defendant of real estate, subject to the mortgage described and referred to in said declaration, had a claim on said defendant for indemnity against liability of the land thus purchased by them against said mortgage.

3rd. That the defendant, fraudulently and with intent to deceive and defraud the plaintiff, failed to give notice according to the provisions of the act of Congress in such case made and provided, to him the plaintiff, to shew cause why the discharge and the certificate in the said third plea mentioned should not be granted.

The defendant filed two rejoinders to each of these replications—the first, third and fifth being formal traverses of the allegations in the pleas. The second and fourth replications allege that the supposed transfers in first and second replications mentioned, were made before the application of defendant for the benefit of the bankrupt law. The 6th rejoinder is to the third replication, and alleges that the plaintiff might have shown cause against the discharge without notice, if there had been any.

The plaintiff demurred to the 2nd, 4th and 6th rejoinders, but the demurrers were overruled, and judgment rendered for the defendant, to reverse which this appeal is prosecuted.

*GOODE, for Appellant.*

*GEYER, for Appellee, insists:*

1. The decisions of the Circuit Court, on the demurrers to the second breach, and to the third plea to the first breach in the original declaration—there being no judgment rendered thereon—are

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not now the subject of revision; or, if they are, it will be seen that no error was committed by reference to the points made, and authorities cited, on the questions arising on the subsequent pleadings. There is no covenant set out or alleged in the declaration upon which either breach could be assigned, in the manner in which the pleader has assigned them. The covenants in law created by the use of the words "grant, bargain and sell," are restrained by the special covenant in the deed; there is, therefore, no covenant against incumbrances, as the pleader supposed, and if there was, that breach is not well assigned in not stating what incumbrances there were, or when created. The first breach alleges generally that the defendant did not defend the premises, without alleging an eviction, or any thing equivalent to it. The covenant is of warranty against the claims of all persons generally, and specially against the mortgage. It is therefore a warranty of title as against the mortgage, as well as against other claims, or a covenant for quiet enjoyment; and in either case, there is no breach until there is an eviction, or at least a disturbance in the possession.

2. The amended count of the declaration sets out the deed *in extenso*, and the only covenant contained in it is penal, to warrant and defend the lot, (that is, the title and possession) against all persons lawfully claiming or to claim the same, in law or equity, and against all titles, liens and incumbrances whatsoever, and particularly against the mortgage in the deed described, forever.—No covenant in law is raised by the deed, although it contains the words "grant, bargain and sell;" the express covenant in the deed restrains the covenants which would otherwise arise. A covenant has the same effect, whether created by statute or by the common law; both are covenants in law—both raised by implication from certain words not in themselves amounting to a covenant; the one being a statutory and the other a common law interpretation of the words, and both laws being of equal potency and of equal obligation, the effect of a covenant in a deed upon the instrument is in both cases the same. The covenants resulting from the words "grant, bargain and sell," by statute, may be declared on as if expressly inserted in the deed. This is equally true of the covenant raised by the common law on other words. 2 Bac. A., tit. Covenant, B.; Barney vs. Keith, 4 Wend., 502. An express covenant of warranty in a deed qualifies and restrains implied covenants, that is, such as are raised by the common law. Vanderkerr vs. Vanderkerr, 11 J. R., 122. So, general express covenants in a deed are restricted by special covenants—as where the land conveyed is described as containing 600 acres, and the grantor covenanted that the tract did contain 500 acres, and added also generally a covenant of seisin, it was held that the latter is restrained by the former as to quantity. Whallon vs. Kauffman, 19 J. R., 97. The same principle is maintained in Fitch vs. Baldwin, 17 J. R., 161, where a deed contains a covenant of seisin, and a warranty against all claims except the Lord of the Soil; the two covenants must be taken together, and the exception in the last is applicable to both. Cole vs. Hughes 2 Johns. Ca., 203.—See also 9 J. R., 106, for the same doctrine.

3. There is no covenant, express or implied, in deed or in law, that the defendant would pay the mortgage debt and interest, as the same should become due, according to the tenor and effect of the mortgage;—no such covenant is raised by the common law or statute, nor is it expressed in the deed. The special covenant is to defend the premises against the mortgage; a covenant at most for quiet enjoyment. Vanslyck vs. Kimball, 8 J. R., 198. It is not more a covenant to pay the mortgage than to purchase outstanding titles; the stipulation is the same in respect to both, and must have the same interpretation; it would not be a good assignment of a breach that the grantor had no title. 3 S. & R., 364. In a word, as to the warranty against title, there is no breach without an eviction. Clark vs. McNully, 3 S. & R., 364; Twombly vs. Henly, 4 Mass., 442; Greenly vs. Wilcox, 2 J. R., 1; Follard vs. Wallace, 2 J. R., 395. The first breach assigned is therefore bad.

4. The second breach assigned in the amended declaration, purports to be of the express covenant, and is in substance that the defendant did not warrant and defend the premises against the mortgage recited, but neglected and refused to do so; by means whereof, the plaintiff was obliged to pay, and did pay, a sum of money in discharge of that mortgage. This breach is not within

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the covenant. The covenant was either of title or possession, or both, as against the mortgage, or for quiet enjoyment; and, in either case, it was necessary to aver an eviction or that which is equivalent. A covenant to indemnify and save harmless from all demands and damages whatsoever, which might happen or arise on account of a certain mortgage, is tantamount to a covenant for quiet enjoyment; and the plaintiff must aver and prove an eviction under the mortgage. *Vanslyck vs. Kimball*, 8 J. R., 198. Covenants of general warranty and for quiet enjoyment are only broken by a lawful eviction of the grantor, or that which is equivalent. *Greenby vs. Wilson*, 2 J. R., 1; *Folleard vs. Wallace*, 2 J. R., 395; *Walden vs. McCarty*, 3 J. R., 471; *Kortz vs. Carpenter*, 5 J. R. 120; *Kent vs. Welsh*, 7 J. R., 258; *Sedgewick vs. Hollenback*, 7 J. R., 376; *Vanslyck vs. Kimball*, 8 J. R., 198; *Vanderkerr vs. Vanderkerr*, 11 J. R. 122; *Whelback vs. Cook*, 15 J. R. 483; *Webb vs. Alexander*, 7 Wend., 281; *Cobb vs. Wilban*, 2 Dev., 388; *Grist vs. Hodges*, 3 Dev., 200; *Cowen vs. Sullivan*, 4 Dev., 46; *Warn vs. Beckford*, 9 Price, 43; *Duval vs. Craig*, 2 Wheat., 45.

5. The last breach assigned is preceded by an averment that the defendant covenanted that the lot was at the time free from incumbrances suffered by the defendant, and alleges that the lot was not at the time free from incumbrances suffered by the defendant, by means whereof, the plaintiff was obliged to pay, and did pay, a large sum of money in extinguishing incumbrances, generally, without stating what incumbrances, or when he paid them off. The deed contains no such express covenant as that averred, nor is any such raised by the statute, (see 2nd point, and authorities there cited) and if there was such covenant expressed, or implied by law, it is restricted by the terms of the deed itself, and modified by the special covenant. Besides, the deed expressly states the existence of a mortgage, and makes an express covenant in relation to it, and it would do violence to the language of the grantor to hold that he covenanted that the lot was free from incumbrances, at the same time reciting one on the face of the deed. But upon no interpretation of the deed, is the third breach well assigned; the assignment ought to set out particulars. *Marsten vs. Hobbs*, 2 Mass., 433; *Mitchell vs. Warner*, 5 Cow., 497. There is no description whatever of the incumbrances, so as to enable the defendant either to deny their existence or plead their discharge.

6. If it shall be held that the breaches, or any of them, are well assigned, so as to shew a cause of action, the defendant is discharged by his certificate, which is well pleaded to the whole declaration. It is by the act of Congress, a full and complete discharge of all debts, contracts and other engagements proveable under the act;—by the 5th section, all creditors whose debts are not due and payable until a future day, all holders of policies of insurance, securities, endorsers, bail, or other persons, having uncertain or contingent demands against the bankrupt, shall be permitted to come in and prove their debts or claims under the act. The adjudged cases in England, under the statutes of that country, and those in the United States under the Bankrupt Law of 1800, are inapplicable to the case. Under those laws, uncertain and contingent demands were not proveable, and therefore not barred by the certificate. The late Bankrupt Law of the United States, 5th section, is more extended, and is purposely so framed as to exclude none from participation in the fund, and to bar all by the discharge.

7. The discharge and certificate pleaded, is declared by the 4th section of the Bankrupt Law to be a complete bar, and conclusive evidence in favor of the bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property.

NAPTON, J., delivered the opinion of the Court.

One of the principal questions presented by the record in this case, grows out of the certificate of bankruptcy, which is set up in the third plea as a defence to the action. We have been referred to a number of adjudications, made on the British bankrupt laws, and upon our bank-



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rupt act of 1800, which tend to show, that under those acts, a certificate of bankruptcy did not relieve the bankrupt from contingent liabilities like the present. It is unnecessary to refer particularly to these cases. They are collated and reviewed by the American editor of Smith's leading cases in a note to the case of Mills vs. Auriol (S. L. C., 436.) The bankrupt law of 1841, is however, in many respects *sui generis* and materially unlike the British statutes or the act of 1800, upon which these adjudications were had. The 4th section provides, that the discharge and certificate granted by virtue of the act, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under the act, and that the same may be pleaded in bar to any action brought against the bankrupt. The character of the claims, which may be proved under the act, is specified in the 5th section. Amongst other things, it is declared that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons having *uncertain or contingent demands* against such bankrupt, shall be permitted to come in and prove such debts or *claims* under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them, &c."

It will be observed that this language is very comprehensive. Lord Coke has said (Co. Lit., 291, b. fol.) that the word *demand* is a word of art, and the strongest word in the law, except the word *claim*, and that a release of all demands releases "all mixed actions, a warranty which is a covenant real, and all other covenants real and personal, conditions before they are broken or performed, or after, annuities, recognizances, statutes merchant or of the staple, obligations, contracts, &c." Now the statute uses both the word *demand* and the word *claim*, and seems to have designed to effect a complete extinguishment of all the debtor's liabilities, however contingent or uncertain.

Under the Bankrupt act of 1800, no debt, but such as was due and owing at the time of the bankruptcy, could be proved under the commission. The 34th section of the act provided in terms, that the certificate should discharge the bankrupt "from all debts by him due or owing, at the time he became a bankrupt." Such also was the character of the English bankrupt laws, until a very recent period. Eden on B. L., 239. But the bankrupt act of 1841 expressly provides for debts not due, and



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for liabilities, contingent and uncertain, and makes the discharge co-extensive with the right to a dividend.

It is admitted in all the cases to which we have alluded, that a bankrupt law may be so framed as to avoid and annul all contracts, existing at the time of the bankruptcy, whether the liability of the bankrupt upon such contracts was fixed at the time of the bankruptcy or depended entirely upon contingencies which might afterwards arise. If language could be selected to convey this idea with precision and certainty, we think it must be conceded, that the framers of this act have succeeded in adopting it.

The first replication to the plea of bankruptcy set forth, that the defendant, on, &c., at, &c. made a transfer of property in contemplation of bankruptcy, and for the purpose of giving a preference to a creditor of said defendant over the general creditors of said defendant.

The second replication avered, that the defendant, on, &c., at, &c., made a transfer of property in contemplation of bankruptcy, and for the purpose of giving a preference to Richard S. Tilden, Lyman B. Shaw, and Mary Brown over the general creditors of said defendant; that heretofore, to wit: on, &c., at, &c., said Tilden, Shaw, and Brown as purchasers from said defendant of real estate subject to the mortgage described and referred to in said declaration, had a claim on said defendant for indemnity against the liability of the land thus purchased by them against said mortgage.

The third replication was, that said defendant fraudulently and with intent to deceive and defraud the said plaintiff, failed to give notice, according to the provisions of the act of Congress in such case made and provided, to him the said plaintiff, to show cause why the discharge and certificate in said third plea mentioned should not be granted.

To the first replication, the defendant rejoined,

1. That he did not in contemplation of bankruptcy make a transfer of property in manner and form as alleged, &c.

2. That said supposed transfer of property was made before he petitioned for the benefit of the bankrupt law.

To the second replication, the defendant rejoined,

3. That he did not, in contemplation of bankruptcy, make a transfer of property, and for the purpose of giving a preference to Tilden, Shaw and Brown, &c.

4. That said supposed transfer was made before he petitioned for the benefit of the bankrupt law.

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To the third replication, the defendant rejoined,

5. That he did not fraudulently and with intent to deceive and defraud said plaintiff, fail to give notice, &c.

6. That said plaintiff might, without the notice, have shown cause, if any such existed, &c.

Issues were taken on the first, third and fifth rejoinders and demurrers filed to the second, fourth and sixth. Judgment was given on the demurrer for the defendant.

As the rejoinders demurred to were clearly bad, the demurrer must have been sustained, either because the replications were bad or the declaration did not set out a sufficient cause of action. It is unnecessary to notice the first replication, as the second sets up more definitely the same matter intended to be relied on in the first. This replication, (we mean the second) is based upon the provisions contained in the second and fourth sections of the bankrupt act. The second section declares, that all transfers of property, in contemplation of bankruptcy, and for the purpose of giving any creditor a preference or priority over the general creditors of such bankrupt, shall be deemed void and a fraud upon the act; and the assignees shall be entitled to sue for and receive the same as a part of the assets of the bankrupt, and the person making such unlawful preference shall receive no discharge. The fourth section provides, that if any bankrupt be guilty of any fraud or wilful concealment of his property, or shall have preferred any of his creditors, contrary to the provisions of this act, he shall not be entitled to any discharge or certificate. It is further declared in the same section, that the final certificate may be pleaded in bar to any action brought against such bankrupt, unless impeached for some fraud or wilful concealment of property, contrary to the provisions of the act. A transfer of property, in contemplation of bankruptcy, and for the purpose of giving a preference to any creditor over the general creditors of the bankrupt, is declared to be a fraud upon the act, and this fraud upon the act, is expressly authorised to be set up as an answer to the certificate, whenever it is pleaded. There can be no doubt, then, that the matter intended to be relied on in the second replication, constitutes a sufficient answer to the plea of bankruptcy, if it has been properly pleaded. The objections to the replication are that it does not specify the particular property conveyed, nor the person to whom the transfer was made. If the amount or character of the property transferred could have any influence in determining the nature of the transfer, it should certainly be stated; but

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as all transfers, made with the motives and objects specified in the replication, are declared to be frauds upon the bankrupt act, and to avoid the certificate, whatever may be the amount or nature of the property transferred, it cannot be material that these particulars should be stated, unless they are essential to inform the adverse party of the conveyance or transfer intended to be relied on. So also the omission to state the nominal parties to the instrument, which constituted the evidence of the transfer, could not be very material, when the parties, who were beneficially interested, are stated.

The third replication is bad. The want of notice for which the statute provides, is nowhere declared to avoid the certificate. The regulations on this subject are directory to the court trying the cause, but a failure to comply with such regulations does not necessarily avoid its judgments. It is nowhere so declared in the act, and upon general principles, it would not have such an effect. If there has been no fraud, and no transfer of property contrary to the provisions of the act, it cannot matter whether every step in the proceeding was regular or not.

The only question remaining to be examined, is the sufficiency of the breaches set forth in the plaintiff's declaration. The deed declared on, contains the words "grant, bargain and sell," and after reciting, that on the lot so conveyed, there was a mortgage executed by the grantor to one Languemare to secure the payment of five thousand dollars, contains a special covenant on the part of the grantor, his heirs, executors and administrators, that he will forever warrant and defend the premises conveyed, against all persons lawfully claiming or to claim the same, in law or equity, and against all titles, liens, and incumbrances whatever, and particularly against the mortgage above described. The breaches assigned in the declaration are :

1. That the defendant covenanted with the plaintiff, amongst other things, that said defendant would pay said mortgage debt, with interest, &c., but that said defendant did not pay said mortgage debt, &c., but hath wholly failed to do so, and that the plaintiff had paid a large sum, to wit: seventeen hundred dollars, in discharge of said mortgage.

2. That the said defendant has not warranted and defended the said premises against the said mortgage, but hath hitherto wholly neglected and refused to do so, and by reason of this said plaintiff was compelled to satisfy said mortgage.

3. That said land was not free from incumbrances, suffered by the grantor at the time, &c.

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The first and second breaches in the declaration are founded on the special covenant in the deed. That covenant is a covenant to warrant and defend the title and possession against all liens, and especially against the incumbrance specified in the deed. There is no covenant that the grantor will pay off the mortgage, nor is any such covenant implied by the covenant of general warranty. Nor is the payment of the mortgage by the grantee any breach of the covenant of general warranty, or of the covenant of quiet enjoyment. It seems to be well settled, that a disturbance of the possession is necessary to constitute a breach of these covenants. Among the numerous cases, which are to be found on this subject, both in the United States and England, I have met with none in which a mere payment of money for the purpose of buying in a paramount title or extinguishing a mortgage has been held to be a breach of this covenant. The case of *Sprague vs. Baker*, (17 Mass. R., 586.) seems to countenance this idea to some extent; but even in that case, whose authority has been much questioned, the payment of the mortgage was made under threats of a suit for possession. There must be an eviction or something equivalent thereto, to constitute a breach of this special covenant.

The third breach is upon the statutory covenant against incumbrances. In setting out a breach of this covenant, it is not necessary to state an eviction, but the existence of an incumbrance at the time of the conveyance is a breach of the warranty. The particular incumbrance relied on, must however be specifically stated; and this brings up the question, whether the special covenant against the mortgage to Languemare, does not restrain the general covenant against incumbrances created by the words "grant, bargain, and sell." In the case of *Hesse vs. Stevenson*, (3 Bos. & Pul., 574,) Lord Alvanly said, "from all the cases upon this subject it appears to be determined, that however general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words." Can we suppose, that, where a party in a deed makes a special covenant to warrant and defend against a particular mortgage recited in the deed, he at the same time intends, by a general covenant against incumbrances, to covenant against the existence of this particular mortgage? Can the two covenants stand together? If we allow the covenant against incumbrances to include the mortgage of Languemare, we have a party first

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recognising the existence of this mortgage and making a special covenant in relation to it, based upon the hypothesis of its existence and only providing against any disturbance or eviction under it, and at the same time covenanting that the land was free from all mortgages. Upon this construction of the deed, the grantor covenants against an incumbrance, the existence of which he acknowledges in the deed containing the covenant. Such a construction does violence to the language of the deed, and the manifest intention of the parties. It is true, that by confining the grantee to his special covenant, he does not reap the same advantages from the payment of this incumbrance, which he would have done had no special covenant been inserted in the deed; but this is the result of the grantee's own choice. He prefers a special covenant framed to suit his own views, we must suppose, to those general covenants which the law would have raised upon the language of the deed, and accordingly protects himself by this special covenant. If the special covenant prove less beneficial than the general one, it is his own fault. Parties are at liberty to make their own contracts, and upon a fair construction of this deed, it seems impossible to doubt, that the grantee designed to protect himself by special covenant against a known incumbrance, and that this special covenant was framed to meet the contingencies against which he desired to provide. That he has misunderstood the character of his covenant and paid up the mortgage, without waiting for a suit, much less an eviction, are circumstances which cannot vary the nature of his deed, or entitle him to relief in an action upon his covenant. The breach of the covenant against incumbrances is therefore not good—because the deed contains no covenant against the existence of the mortgage to Languemare, but on the contrary recognises its existence, and contains a special warranty against any disturbance under it.

The other Judges concurring, judgment affirmed.

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HOGEL vs. LINDELL.

1. Although the law prohibits oral instructions, yet, if given, the party who is aggrieved by them can alone complain.
2. Although the receipt of the purchase money be acknowledged in a conveyance, it may be shewn by parol that it has not been paid.



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3. It is not, however, competent at law to shew by parol that a deed, absolute on its face, is in fact a mortgage.

## ERROR to St. Louis Circuit Court.

## GEYER, for Plaintiff, insists:

1. The Circuit Court was not authorized to charge the jury orally, without consent of parties—the act of 1838 not being repealed. See acts 1838-9, page 27; Rev. Co. 1845, p. 362, sec. 19-20.

2. If oral instructions were not forbidden by law, those given are erroneous, because they have a direct tendency to embarrass and mislead the jury; because they so *explain* the written instructions as to submit to the jury the interpretation of a contract, and at the same time make the whole case depend on a single fact, which being found either way, the jury are informed, is to be followed by a verdict for the defendant, virtually taking the whole case from the jury. *Hughes vs. Ellison*, 5 Mo. R., 110; *Morton vs. Reed*, 6 Mo. R., 64; *Fugate & Young vs. Carter*, 6 Mo. R., 267; *Newman vs. Lawless*, 6 Mo. R., 293; *Plater vs. Scott*, 6 Gill. & J., 116; *Selin vs. Spander*, 11 S. & R., 319; *Wash vs. Maclay*, 2 S. & R., 415; *Coleman vs. Roberts*, 1 Mo. R., 97; *Woodward vs. Thornton*, 8 Mo. R. 161; *Jones vs. Talbot*, 4 Mo. R., 279; *Hickman vs. Griffin*, 6 Mo. R., 37.

3. The contract between the plaintiff and John Lee & Co., being reduced to writing, the only fact to be determined by the jury was the authority of Elliott Lee to bind the defendant, Lindell. The interpretation of the contract was exclusively within the province of the court. *Coleman vs. Roberts*, 1 Mo. R., 97; *Fugate & Young vs. Carter*, 6 Mo. R., 267; *Newman vs. Lawless*, 6 Mo. R., 279; *McRea vs. Scott*, 4 Rand., 463; *Wash vs. Maclay*, 2 S. & R., 415; *Broome's Legal Maxims*, page 44-5 and cases cited; 3 *Bingham*, 217; (13 E. C. L. R.) *Levis vs. Gadsby*, 3 Cranch, 180; 8 Co. R., 308; 9 Co. R., 13; *Coke Lit.*, 295, i.

4. Oral evidence of previous negotiations, or tending to prove that the deed absolute in its terms was intended as a mortgage, or in any manner to vary, contradict or defeat the deed, was incompetent, and if admitted, cannot be taken into consideration by the court in determining the legal effect of the deed, nor authorize a reference of the question to the jury. In a court of law, the evidence of a condition, defeasance or covenant, must be evidenced by writing of as high a nature as the deed; and even in equity, evidence that an absolute deed was intended as a mortgage, must be in writing, unless it is proved that the defeasance was either through fraud, accident or mistake, never executed, or has been lost or destroyed. *Cowen & Hill's notes to Phillips*, part 2nd, page 1467; 2 *Stephen's N. P.*, 1532; *Woodward, et al. vs. McGaugh, et al.*, 8 Mo. R., 161; *Keller vs. Brown*, 4 Mass. R., 443; *Flint vs. Shelden*, 13 Mass. R., 443; *Flagg vs. Mann*, 14 Pick., 467; *Selwate vs. Hanover*, 16 Pick., 222; *Lund vs. Lund*, 1 N. H. R., (Adams') 39; *Beckford vs. Daniel*, 2 N. H. R., 71; *Rundlett vs. Otis*, 2 N. H. R., 197; 15 J. R., 205, 255; *Cowen & Hill's notes*, pt. 2nd, page 1428, 1433; *Champion vs. White*, 5 Cowen, 509; *Hull vs. Adams*, 1 Hill, 60; *Bond vs. Susquehannah Bridge Co.*, 6 Har. & John., 128.

5. The oral evidence, if competent and credible, does not prove, or tend to prove, that there was any condition of defeasance, oral or written, nor any covenant or agreement; there was no debt to be secured; the previous debt was discharged and the securities given up and cancelled.—No remedy against Hogel;—at most, there was a resulting trust to pay to Hogel whatever the property should bring over and above the amount of the extinguished debt—and such a trust cannot be established by parol. *Flint vs. Shelden*, 13 Mass., 443; *McFier vs. Shepperd*, 1 Bay, 461; *Shealer vs. Jones*, 1 Murphy, 449; *Godwin vs. Hubbard*, 15 Mass., 218; *Dickerson vs. Dickerson*, 1 Car. Law Reps., 262.

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6. The acceptance of the deed by Lindell, and the use of the property as his own, is a ratification of the contract, as made in writing by Lee, on behalf of the firm, and there is nothing to justify the 4th instruction given by the court. There could be no necessity for any subsequent agreement between the plaintiff and the defendant, especially after a refusal by the defendant to make any, in respect to the time and manner of the payment.

7. A new trial ought to have been awarded on account of misdirection, and because the verdict is against law and evidence. The deed is not a mortgage, and could not be made so by oral evidence. The evidence given by defendant, if allowed to control the deed, does not establish any condition of defeasance, and is, besides, in all essential particulars, overwhelmed by the testimony of several disinterested witnesses to the transaction.

*GAMBLE & BATES, for Defendant, insist:*

1. The document in the form of an account is to be taken as a whole, and if it shows a balance of purchase money unpaid, it shows what was the understanding of the parties at the time in relation to said balance, and shows a special agreement subsisting and executory, upon the violation of which the plaintiff could have his action, and which remaining unexecuted prevented his suing in the present form. *Stollings vs. Sappington*, 8 Mo. R., 188; *Chambers vs. King & Tunstall*, ib. 517. *Note*.—There is no count upon this agreement and no evidence that it has been either executed or broken.

2. If the true character of the transaction appears to be that the conveyance should be security for a debt, and not a sale of the property, the plaintiff is not entitled to recover. Courts of law recognize the rule, that a mortgagor is still the owner of the land mortgaged. 4 John. R., 41; 1 Wend., 433; 11 Johns., 534; 14 Wend., 63; 8 ib., 641; 9 ib., 227; 9 Cow., 406; 4 Bibb, 441; 7 J. J. Mar., 133; 1 A. K. Mar., 582. Courts of law will also recognize the rule that a deed, absolute on its face, if it is a mere security for a debt, will be treated as a mortgage—that the property may be redeemed—that the mortgage may be foreclosed. In this case, the plaintiff first goes out of the deed to show the nature of the transaction, and then the defendant gives his evidence to show its nature; and this evidence being admitted, shewed that the plaintiff had no right of action for property sold, nor for money received—nor for money paid—nor upon an account stated. 5 Greenleaf, 96; 7 ib., 435.

3. There is an exception to the oral explanations given to the jury by the court. As these explanations were all favorable to the plaintiff, it is supposed the exception is only made to their being oral, on the ground that the court could not instruct except in writing.

The prohibition of oral instructions formerly in force, was in an act supplementary to the act establishing courts of justice and prescribing their powers and duties. *Sess. acts of 1838*, page 27.

The revised laws, entitled "An act to establish courts of justice and prescribe their powers and duties," Revised Code, page 328, is a revision of all previous acts upon that head.

The 20th section of the act concerning the Revised Laws, page 699, repeals all acts that were revised and not contained in the Code.

*Scott, J., delivered the opinion of the Court.*

This was an action of assumpsit brought by the plaintiff against the defendant in error for part of the consideration money of a lot alleged to have been sold and conveyed by the plaintiff to the defendant. The de-

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claration also contained most of the common counts. Pleas, non-assumpsit and set-off. Upon the trial, the defendant obtained a verdict.

At the trial, a deed was produced by the defendant, on notice, and was read in evidence by the plaintiff. It is dated the 1st December, 1837, and is a conveyance by plaintiff to the defendant of the lot in the declaration mentioned, for the consideration of \$4,500 in hand paid, the receipt of which is acknowledged. The plaintiff, after proving that John Lee, Elliott Lee and the defendant composed the firm of John Lee & Co., produced and read in evidence an account, with the memorandum thereon, proved to be in the hand writing of Elliott Lee, one of the firm of John Lee & Co., as follows :

"Jefferson City, 1st Dec'r, 1837.

Mr. John F. Hogel,

	To John Lee & Co.,	Dr.
To amount of your note, dated 10th August, 1836,	-	\$909 49
" interest on same to date,	- - -	121 20
" of Hogel's & Stuart's account,	- - -	1385 37
" interest on same,	- - - - -	80 81
" Joseph Martin & Co. ac't and interest,	-	82 18
		<hr/> 2579 05

Cr.

By brick house on Madison street, lot containing 50 feet front	
by 125, as per deed of date,	- - - - - 4250 00
	<hr/> \$1670 95

Which balance of \$1670 95, is to be paid as per agreement hereafter to be made between J. G. Lindell and said Hogel."

Evidence was given tending to show that the sale was absolute; that the property, at the time of the sale and afterwards, was worth \$350 annually, though its rents afterwards fell considerably. Lindell, when asked for the balance due for the lot, would say that he would not pay until the property was sold. No evidence was given showing that any agreement had been made respecting the payment of the balance. The defendant produced in evidence declarations showing that the conveyance, though absolute in its terms, was only designed as a security for a debt, and that the plaintiff was only to be entitled to what might remain from the proceeds of the sale after payment of the debt. The evidence on this subject was contradictory. The defendant accepted the deed of conveyance and received the rents.

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The court, on the prayer of the defendant, instructed the jury as follows:

That if the jury find from the evidence that the conveyance of the house and lot in Jefferson City was made for the purpose of securing the debt due from Hogel to John Lee & Co., and not as an absolute sale of the same to Jesse G. Lindell, then the jury must find for the defendant.

That the jury must find for the defendant, unless they shall believe from the evidence that there was an agreement made between Jesse G. Lindell and Hogel, in relation to the balance of the consideration money for the lot in Jefferson City; and that, according to such agreement, the said balance was due to Hogel at the commencement of this suit.

Which instructions were given by the court to the jury in writing, together with oral explanations, as follows.

That it was competent for one of several partners to bind his copartners, so long as his acts or contracts were within the scope of the business or objects of the copartnership. And in this case, if the jury should believe, from the testimony, that the agreement alleged to have been made by Elliott Lee with the plaintiff for the purchase of the lot in question, and for payment of the balance sued for, was made for and on account of the firm of John Lee & Co., for the purpose of securing a debt due from the plaintiff to said firm, the said agreement is binding on all the members of the firm.

That it was competent for the firm of John Lee & Co. to make the alleged agreement binding on said firm by adoption, whether the said agreement was within the scope of the copartnership business or not; therefore, if the jury should believe from the testimony that the defendant, Lindell, accepted the deed of the plaintiff for the lot in question, under and in pursuance of the said agreement, the same is binding upon the defendant.

To the giving of which two last mentioned instructions in writing, and the oral explanations thereof by the court to the jury, and each of them, the plaintiff excepted.

One of the questions presented for our consideration is, the propriety of the oral instructions given by the court below. If oral instructions should be given, and it could not be ascertained what they were, under the late law, it would be a cause for reversing the judgment. But if they are preserved in the bill of exceptions, and it appears that they were favorable to the party complaining, or did not at all affect his rights as a suitor, it would be difficult to find a ground on which to place such

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a construction of the statute as would overturn the judgment. The instructions may have been given without the solicitation of the party obtaining the verdict, and even against his consent, and yet to deprive him of his ascertained rights, and to subject him to the payment of costs, merely because the Judge has wilfully violated a statute in a way that did not at all conduce to the attainment of his verdict, would seem to be the greatest injustice. The statute gave the right of excepting to the party aggrieved; and unless he was aggrieved by the instructions, he had no right to except. The prohibition of oral instructions was contained in the statute of 13th February, 1839, secs. 1 and 2. The title of the act was "An act supplementary to an act to establish courts of record and prescribe their powers and duties." Taking together the 19th and 20th sections of the act concerning the revised laws, they must be considered as prescribing the rule that the laws which were revised and published in the code of 1845, after their taking effect, repealed all laws, whether original or amendatory, under the title to which they relate. Any other construction would produce great confusion, and render it almost impossible to ascertain what laws were, or were not in force. The general law concerning courts having been revised, we must presume the acts supplementary thereto likewise underwent revision, and that portion of them in relation to oral instructions having been omitted, we must presume that such was the purpose of the Legislature.

The law seems to be settled in England, that where the receipt of the purchase money is acknowledged in a deed of conveyance, the vendor is not permitted to show that in reality it has not been paid. *Shelley vs. Wright, Willis'*, 9; *Rowntree vs. Jacob*, 2 Taun. But the weight of authority in the American courts is in favor of treating the recital as only *prima facie* evidence of the payment of the purchase money in an action of assumpsit by the grantor to recover the price which is yet unpaid.—*Greenleaf*, 33. But with regard to the admission of parol evidence in a court of law, to convert an absolute deed into a mortgage, the authorities are against it, except in New York, where it is conceded that a contrary rule is an innovation upon the principles of the common law. The doctrine in that State, that in courts of equity, an absolute deed may be turned into a security for the payment of money, without an allegation of fraud, accident or mistake, is repudiated in most of the States. *Swart and others vs. Service*, 21 Wend., 36; *Parteriche vs. Poulet*, 2 Atkins, 383; *Flagg vs. Mann*, 14 Pick., 467; *Lund vs. Lund*, 1 New Hamp., 39; *Sugden on Vendors*, 98; 2 *Dana*, *Stanton vs. Commonwealth*, 387; *Con-*



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ner vs. Chase, 15 Ver., 764. The instructions given relative to the nature of the conveyance should therefore have been refused.

It appears that when Lindell was called upon for the balance of the purchase money of the lot alleged to have been due, he always declared that he would not pay it until he had sold the house. From aught that appears in the bill of exceptions, that may have been the agreement between Hogel and Lindell. The balance was to be paid by agreement thereafter to be made between them. As the grantor, notwithstanding the acknowledgment of the receipt of the purchase money, may show that it has not in fact been paid, if, in so doing, he shows that it was to be paid on the performance of a particular act, that act must be shown to have been done, or an excuse for its non-performance be given. There is nothing preserved in the bill of exceptions which shows that the agreement was ever abandoned, or that the defendant prevented its performance.

The other Judges concurring, the judgment will be affirmed.

MULLANPHY vs. RILEY.

A. obtains judgment against B., after which B. dies. To satisfy the judgment, and release the lien upon the lands of B., after his death, his widow executes a note and mortgage. Held to be on sufficient consideration, the question as to the existence of the lien after the death of the debtor being one of doubt.

ERROR to St. Louis Court of Common Pleas.

LEONARD & BAY, for Plaintiff, insist:

1. A note given by way of settlement, and to avoid the trouble, expense and risk of litigation, where the law is doubtful, and there is a difference of opinion, will not be held invalid for want of consideration. Longbridge vs. Dorrille, 5 B. & A., 117; 1 Leigh's Nisi Prius, 30; Brown vs. Sloan, 6 Watts, 421.

2. Damage, trouble, inconvenience or prejudice to the promisee, constitutes a good consideration, as benefit to the promisor. 2 Pet. Rep., 182; 5 Cranch, 142; 8 Mass., 200; 6 Mass., 58; 4 Munf., 63; Johnson's Cases, 52; 1 Conn. Rep., 519; Chitty on Contracts, 25; Marks vs. Bank of Mo., 8 Mo. R., 316. Waiver of a legal right, at the request of another person, is a good consideration for a promise by him. 2 N. H., 97; 4 Pick., 97; 14 Johns. Rep., 466.

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3. The facts presented in this case do not materially differ from those presented when the case was before this Court at the July term, 1844, (see same case, 8 Mo. R., 675) at which time the foregoing points were recognized as correct and applicable to the facts.

Since that decision, this Court has decided that the lien of a judgment is not lost by the death of the judgment debtor. *Prewitt vs. Jewell*, 9 Mo. Rep., 732. The instructions given on the part of the defendant were clearly erroneous:

1. Because the court instructed the jury that the lien of Mullanphy's judgment against Riley was extinguished by the death of the latter, thus making the case turn upon a point entirely immaterial;

2. Because the jury were instructed to find for the defendant if they should believe from the evidence that the mortgage was executed by defendant to extinguish such supposed lien, she relying upon the opinion of the plaintiff that such lien existed. Whether the lien existed or not, was immaterial. The only questions that could arise upon this point, were, 1st, Whether Mullanphy's opinion or representation was made in good faith; and, 2nd, Whether the question of the lien was one about which a reasonable doubt might be entertained.

**GAMBLE & BATES, for Defendant, insist:**

As to both the plaintiff's instructions, there is no foundation for either of them in the facts of the case, as stated in the bill of exceptions. They are inapplicable to the case, and could but tend to mislead the jury.

**McBRIDE, J., delivered the opinion of the Court.**

This was a petition to foreclose a mortgage, brought by Mullanphy against Riley in the St. Louis Court of Common Pleas. The defendant pleaded *nil debit*, and gave notice (under the statute) that upon the trial she would show a want of consideration for the making of the note and mortgage; and that the said note and mortgage were executed under an erroneous belief of indebtedness superinduced by the representations of the mortgagee, &c. On the trial, judgment was given for the defendant, when the plaintiff moved for a new trial, which being refused, he excepted, and has sued out a writ of error.

To sustain the pleas, the defendant called upon the plaintiff to testify, who stated that he had obtained a judgment against John P. Riley, in his lifetime, for about the amount of the note mentioned in the mortgage, and the said Riley died, leaving the said judgment unsatisfied; that the defendant in this case, the widow of said decedent, and Joseph Walsh, frequently said the judgment should be paid; and finally the defendant, in order to lift the cloud or incumbrance of the judgment from the estate of her deceased husband, and in lieu of said judgment and the lien which it was supposed to create upon the real estate of the deceased, gave the plaintiff this note and mortgage. It was supposed by the witness that

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the lien of the judgment extended over some real estate of the deceased, and was not extinguished by his death. He did not tell them so, but spoke of it to Joseph Walsh, or perhaps to both of them, as a disputed point; gave it as his own opinion that it was so. Walsh replied, by giving Mr. Gamble's opinion that it was not so; and said that he believed that there was no lien or occasion to pay; that Mr. Gamble had told them so, but that the debt ought to be paid, and they would pay it. The witness thought they were not willing to the lien. Joseph Walsh was the person with whom the conversations were chiefly held, and finally, witness urging a settlement, and saying that the widow might take her own time; the note and mortgage were brought to him by Walsh. When the note, which was payable in two years, became due, suit was brought.—Mrs. Riley sent for the plaintiff, and asked his advice, and wished to let judgment go to save costs; but he advised her not to do so, saying the land would sell low, and advised her to employ counsel and make the best defence she could, and to gain time, when the property would probably sell better. The witness further testified, that he had never presented his judgment for allowance in the Probate Court, against the estate of John P. Riley, but suffered the three years time allowed by law for the settlement of the estates of deceased persons to elapse, relying solely on said note and mortgage for his debt.

Mrs. Primm, also a witness for defendant, testified that she was the daughter of the defendant, Mrs. Riley, and was present at a conversation between the plaintiff and defendant, at the house of the latter, in the spring of the year 1841; thought it was the day before the execution of the note and mortgage in controversy. Mr. Mullanphy came in, and asked the defendant whether she had signed the papers; defendant said she had not; plaintiff then said that the papers were a note for the debt and a mortgage on four of the lots, (meaning lots in Riley's addition to St. Louis) which the defendant bought under a deed of trust executed subsequently to the plaintiff's judgment, by said Riley to Gamble; that the defendant might take her own time, and if she executed the note and mortgage, it would release her property from the judgment, which the said plaintiff held against her deceased husband; and if she did not execute the papers, the judgment would bind all her property.—That the defendant said she would consult Mr. Walsh, now deceased, and if he advised her to do so, she would execute the note and mortgage; that she understood that plaintiff had called on the defendant several times before touching the claim, and that the matter had been talked of at different times within three weeks before the execution of the mort-

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gage, but she, witness, was not present at any of said conversations, except the one touching which she has testified as above. That Mr. Walsh was public administrator, and, as such, took upon himself the administration of the estate of John P. Riley. The witness further stated, on cross-examination, that Riley's addition, above alluded to, was made by her deceased father, John P. Riley, before his death, and that at the time of his death, he owned real estate; that the whole seventeen lots purchased by her mother, the defendant, were purchased at a sale made by Mr. Gamble, under a deed of trust given by her father before his death, but after the plaintiff, had obtained his judgment; and that it was claimed by plaintiff that the lien of his judgment extended to the whole of these lots. The witness being asked to state the language, as nearly as she could remember it, used by the plaintiff, in relation to the property and the judgment, said, that plaintiff said that the judgment bound all of her property, and that if Mrs. Riley would execute the note and mortgage, it would release the property; and if she did not, all the property would be bound.

This being all the evidence given in the case by the defendant, the plaintiff introduced Thomas B. Hudson, who testified that the body of the note and mortgage was in the hand writing of Joseph B. Walsh, above named. The note and mortgage having been previously given in evidence, the plaintiff then asked from the court the following instructions, to wit: If the jury find from the evidence that the plaintiff previous to the making of the note and mortgage, promised the defendant that if she would execute and deliver to him, said note and mortgage he would forego or relinquish his claim against the estate of John P. Riley, under his judgment against said Riley in his lifetime, and that the bond and mortgage were executed and delivered by the defendant to the plaintiff in consideration of that promise, and that the plaintiff did in consideration thereof forego or relinquish his said claim against said estate; then the said note and mortgage are obligatory.

2nd. If the jury believe from the evidence that the said note and mortgage were given by the defendant in lieu of the plaintiff's judgment against her deceased husband, John P. Riley, and in satisfaction of whatever claim he might have thereby on the estate of said Riley, and that in consequence thereof the plaintiff forbore to prove up his judgment against said estate in the Probate Court, and suffered his claim to be barred by lapse of time, relying solely on said note and mortgage for his debt, they will find for the plaintiff.

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Which the court refused to give. Thereupon the court instructed the jury, on the part of the defendant, as follows:—

The lien of Mullanphy's judgment against John P. Riley was extinguished by the death of said Riley. If the jury believe from the evidence that the plaintiff represented to the defendant, that such lien subsisted after the death of said John P. Riley, and that she was induced solely by this representation of the law by the plaintiff to her, to execute the note and mortgage in order to extinguish such supposed lien, and that she did not give the same in order to prevent said plaintiff from presenting his judgment for allowance, then the note and mortgage are without consideration.

The action of the court in refusing, and in giving instructions, were duly excepted to by the plaintiff.

This case has heretofore been before this court, and may be found in 8 vol. Mo. R., 675, and following. The only difference between the case then and now, is the evidence of Mrs. Primm, taken on the second trial. This evidence does not, however, materially vary the facts of the case, nor the principles of the law by which it must be governed. In the former decision of this case, the following legal principles were held: Any loss or injury sustained by the plaintiff at the request of the defendant forms a good consideration to support a promise to pay, provided that promise be fairly obtained, and not by fraudulent representations, &c.—A valuable consideration is one, that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. 2 Kent's Com., 465. In addition to which, it may be stated, that the assignment of a debt, even of an uncertain amount, due from a third person, is a sufficient consideration. 2 Blk., 820. So is the release of an equity of redemption. 1 Ld. Raym., 662. So is the assignment of a chose in action. 4 B. & C., 528. So the giving up a suit instituted to try a question respecting which the law was doubtful, there being contrary decisions on the point, has been held to be a sufficient consideration for a promise to pay a stipulated sum. 5 B. & A., 117; 6 Watts, 421. It may not be amiss to quote at length the opinion of the court in the case referred to in 5 Barn. & Ald., 117, as the principle decided in that case, must to a great extent govern in the decision of the case now before us:

"Abbott, Ch. J.—I am of opinion that there is a sufficient consideration in this case to sustain the promise, without inquiring whether the owners of the ship are liable, under the circumstances of the case. It appears



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that a suit had been instituted by the plaintiff in the court of Admiralty, against the *Caroline Matilda*, to compel her owners to make good the damage done by her running foul of another vessel. The ship might have been redeemed from that suit by the defendants giving bail, that proper care should be taken of the ship, and that those on board of her should not leave the Kingdom, until means were taken to secure that evidence which would have enabled the judge to decide the suit, and the plaintiffs might have insisted on such bail. The defendants as agents for the foreign owner of the ship, write a letter in which they engage on the plaintiffs renouncing all claims on the ship, and on proving the amount of damages sustained by the *Zenobia*, to indemnify them for any sum not exceeding £180, the exact amount to be ascertained when the *Zenobia* is repaired. Now the plain meaning of that engagement appears to me to be this: Release the ship, and we will waive all question of law and fact, except the amount of damage; we will pay you £180, if the damage done amounts to that sum. The plaintiffs by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject, and the parties agree to put an end to all doubts on the law and the fact, on the defendants engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion, that the plaintiffs ought to recover."

It is manifest from the testimony of the plaintiff, that he forebore presenting his claim against the estate of John P. Riley, to the Probate Court for allowance, until the same was barred by the statute, in consideration of the undertaking of the defendant to pay the same. If the defendant is not liable on her promise to pay, then the plaintiff is greatly damnified in his reliance on such promise, and his failure in consequence thereof to have his claim allowed. It is likewise shown from the evidence, that whilst the defendant gave it as his opinion, that his judgment against John P. Riley, was a lien on his real estate, a portion of which so bound, was purchased by the defendant, that he at the same time advised her that a difference of opinion prevailed on the subject—and that she in point of fact, had been advised by other counsel, that the plaintiff's lien on the real estate of John P. Riley, was extinguished by his death.

Without undertaking now to decide whether the lien of Mullanphy

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was extinguished by the death of John P. Riley, it is sufficient to say, that it was a question of doubt and uncertainty, and one about which jurists and lawyers might well differ in opinion. 9 Mo. R., 732. And therefore the promise of the defendant, to pay the judgment and release the lien, is not without consideration. So that whether the lien really existed or not, at the time the promise was made, is not, so far as the decision of this case is effected, of any importance.

Applying the foregoing principles to the case, we are of opinion that the court below should have given the instructions asked for by the plaintiff, and that the court erred in giving the instructions asked for by defendant. The judgment of the court of Common Pleas is reversed, and the cause remanded, Judge NARTON concurring herein.

SCOTT, J., *dissenting.*

It is true that a compromise of a doubtful right, is a sufficient consideration to support a promise; but I do not conceive that the evidence proves any such contract between the parties. I do not see what compromise there was. The entire debt of Mullanphy was secured by the mortgage, and if all of it was to be paid, I cannot see that the manner of doing it was at all material. There being then no compromise of a doubtful right, and the judgment in my opinion being no lien on the land, the contract was without consideration and will not support an action.

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LAURENT, ET AL., VS. MULLIKIN.

The judgment of a Circuit Court setting aside a judgment by default, will not be reversed, unless it be a case of gross error.

ERROR to St. Louis Circuit Court.

TOWNSEND, *for Plaintiffs, insists:*

1. That all the proceedings in said cause, down to final judgment for the plaintiff, were regular.
2. The plaintiffs, secondly, insist, that no sufficient cause was shown by the defendant for setting aside the assessment of damages.
3. The plaintiffs maintain that the judgment by default was improperly set aside.

*Laurent, et al., vs. Mullikin.*

**SPALDING & TIFFANY, for Defendant, insist:**

1. The judgment by default ought to have been set aside on Mullikin and Darby's affidavit, as due diligence and merits on behalf of Mullikin are fully disclosed in the affidavits. Rev. Code, 814, sec. 36 and 37; 4 Mo. Rep., 557; Lecompte & wife vs. Wash, 7 Mo. Rep. 6 and 25.

2. The refusal of the court to set aside the default did not preclude the court from again considering the matter, if it were of opinion that the motion had, on the first occasion, been irregularly brought on. As regards the *default*, this was all that the court did. From the new affidavits filed, it appeared that the motion had been prematurely brought on, to set aside the default, and that the defendant had not been heard on the motion, and the court then proceeded to rehear the same, and on the rehearing, set aside the default.

6. The assessment of damages was irregular and illegal, and ought to have been set aside for the following reasons:

1. Because the defendant was surprised and misled by the paper filed releasing damages;
2. Because the damages, as assessed, were exorbitant;
3. Because the defendant had no proper notice that said suit was legally to be called for assessment of damages;
4. Because this suit never was set by order of court for assessment of damages;
5. Because it would have been illegal to set said cause for assessment of damages, at that term, unless for special reasons. 9 Mo. Rep., 406.

**McBRIDE, J., delivered the opinion of the Court.**

This was an action of ejectment, brought by Julie Laurent and others against Charles Mullikin, in the St. Louis Circuit Court, on the 29th October, 1845. On the 25th November, judgment by default was taken, and an order made for the assessment of damages at the same term. On the next day, the defendant filed a motion to set aside the judgment of default and the order for the assessment of damages, supported by affidavits. On the 11th December following, the defendant's motion was overruled, and a jury was empanelled, who assessed the damages, and the plaintiff had final judgment therefor and an award of execution. On the 13th of the same month, another motion, setting out the reasons therefor, and accompanied by affidavits in support thereof, was filed by the defendant, to set aside the judgment on the assessment, the assessment of damages, and the judgment by default, which was by the court sustained, and the same set aside, to which the plaintiff excepted. On the 12th February, 1846, the plaintiff suffered a non-suit, and filed his motion to set the same aside, which, on the 28th of said month, was by the court overruled; to the overruling of which the plaintiff excepted, and has brought his case here by writ of error, to reverse the judgment of the Circuit Court.

The only question presented for our consideration is, whether the Cir-

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*Laurent, et al., vs. Mullikin.*

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cuit Court committed error in setting aside the final judgment entered on the assessment of the damages by the jury—the assessment of damages by the jury, and the judgment of default entered against the defendant.

The affidavits are voluminous, and need not be copied. They show that counsel was employed in due time to defend the suit—that the judgment by default was taken in consequence of the failure of the attorney to plead within the time fixed by law—that the assessment of damages was made in the momentary absence of the attorney, who had been constantly in court for several days awaiting the calling of the case—and that, in the opinion of the defendant and his attorney, the defendant has a meritorious defence to the action. A counter affidavit was filed by the plaintiff's attorney, controverting some of the statements made by the defendant and his attorney.

The setting aside of judgments, and the granting of new trials, are by law properly vested in the Circuit Court. They are discretionary powers, to be soundly and not capriciously exercised, for the furtherance of justice. In the facts of this case, we do not find any reason to question the correctness of the action of the Circuit Court; on the contrary, we are of opinion that, under the circumstances, the court exercised its discretion soundly in setting aside the judgment.

To authorize the court in reversing a judgment of this character, a very strong case would have to be made out: it must appear apparent that the court had egregiously erred or had acted under the influence of improper impulses, for our experience and observation teach that there is but little danger to be apprehended from an undue exercise of this power, on the part of the court; besides, if the party complaining has really a right to recovery, the presumption is that he will obtain his rights in a more ready and speedy way, by another trial in the Circuit Court. If the judgment set aside was wrongfully obtained, then the court, in sitting it aside, has discharged only its duty.

The judgment of the Circuit Court ought to be affirmed, and the other Judges concurring herein, the same is affirmed.

SCOTT, J.

This case is different from those of *Field & Cathcart vs. Matson*, 8 Mo. Rep., 686, and others, involving the same principle. In the case above mentioned, the court below refused to relieve against the neglect of counsel, and this Court sustained its action. The action of the court be-

*Neales vs. The State.*

low was irremediable without the interposition of this Court, and therefore its judgment was revised. But when an application is made to the discretion of the courts, and that application results only in a delay of the opposite party, the necessity for the interference of this Court is not seen. Many seemingly hard judgments of the inferior courts, made on application to their discretion, have been sustained by this Court, not because they were entirely approved, but because, in matters of that kind, those courts are so much better qualified to judge of the propriety of the application than we are. When applications are addressed to the sound discretion of the Circuit Courts, and those courts grant the request, which results only in a delay, and does not make the opposite party remediless, I am not disposed to interfere with the exercise of the discretion entrusted by law to those courts, in matters of that kind. The distinction is this: if the court sets aside the default, the grievance is only delay to the opposite party; on the other hand, if the court refuse the application, the defendant would have been remediless. In the one case I can see the necessity of an interference by this Court, but not in the other.

## NEALES vs. THE STATE.

1. Where different statutes authorize license to be granted for the exercise of any trade, an indictment for exercising such trade without license, should negative a license under any statute.  
State vs. Brown, 8 Mo. R., 210, affirmed.
2. An indictment for keeping a dram-shop, should shew the kind, quantity and price of the liquor sold, and to whom sold.
3. The judge of a court cannot try a defendant in a criminal case upon a plea of not guilty, even by consent of defendant. A jury can alone try such a plea.

## APPEAL from St. Louis Criminal Court.

SIMMONS, *for Appellant*, insists:

The indictment is defective, for the reason that it sets out the capacity of the defendant, but does not allege that the act of selling was committed in that capacity. It is contended that it is



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necessary to set out the capacity of the defendant for the purpose of giving the court jurisdiction, which it does not have if the liquors were sold by the defendant as a tavern keeper. It is then necessary to allege that he sold as a dram-shop keeper,—or, *non constat*, but he may have sold as a tavern keeper, in which case he is not indictable at all, but must be proceeded against in another manner and under another statute.

STRINGFELLOW, *Attorney General, for the State, insists:*

That the indictment is in the words of the statute, and in proper form. The allegation that the defendant kept a dram-shop, and also that he sold liquor by quantities less than one quart, is not double, but is but one allegation.

MCBRIDE, J., *delivered the opinion of the Court.*

Patrick Neales, at the September term, 1846, of the Criminal Court for St. Louis county, was indicted for unlawfully carrying on the trade and business of a dram-shop keeper, without having a license therefor continuing in force. To this charge, he pleaded not guilty; and neither party requiring a jury, the cause was submitted to the court, who found him guilty, and assessed a fine of \$30 against him, and entered judgment therefor. The defendant then filed a motion in arrest of judgment, "because the indictment is double, uncertain, and otherwise defective and informal." And the motion having been overruled, he excepted to the opinion of the court, and has brought the case here by writ of error.

The only assignment of error is, that "the indictment is defective, for the reason that it sets out the capacity of the defendant, but does not allege that the act of selling was committed in that capacity."

The indictment charges "that Patrick Neales, late of the county aforesaid, laborer, on the 10th day of September, in the year of our Lord one thousand eight hundred and forty-six, at the county aforesaid, did unlawfully carry on the trade and business of a dram-shop keeper; and that the said Patrick Neales did then and there unlawfully sell intoxicating liquor in a quantity less than a quart, without then and there having any license whatever therefor continuing in force, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The argument to sustain the error assigned, is, that it is necessary to charge that the defendant sold *as* a dram-shop keeper, or, *non constat*, but he may have sold as a tavern keeper, in which case he is not indictable at all. This argument is based upon a decision of this Court, the

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State vs. Brown, 8 vol., 210, in which it is held that the negation should be broad enough to include all authority which the State, by law, can confer upon individuals to retail ardent spirits. And that where the statute grants the privilege of retailing in two capacities, it is necessary to allege that the defendant was not authorized to do the act in either. We see no good reason to depart from the principles of that opinion—on the contrary, upon a review, we are satisfied that they are correct.

There are other objections to the indictment, which, in our opinion, are insuperable. The *gravamen*, as charged in the indictment, is not set forth with that particularity and certainty which is found in either the old or modern forms. The charge is, that the defendant "*did then and there unlawfully sell intoxicating liquor in a quantity less than a quart,*" &c. To whom sold, the description of the liquor sold, and the price for which it was sold, are entirely omitted in the indictment; and yet this would appear necessary to be stated, otherwise how can the court see that an offence has been committed, or the defendant be apprized of the nature of the accusation against him, and be able to prepare his defence accordingly.

In the language of Lord Hale, "an indictment is a plain, brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." 2 Hale, 169. It is said in 2 Hawk., ch. 25, sec. 57, to be generally a good rule in indictments, that the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone upon insufficient premises.

Another objection, equally fatal, to the judgment, was the trial of the cause by the court, on the plea of not guilty. It has heretofore been virtually decided by this Court, in two cases, that unless the defendant pleads guilty to the charge contained in the indictment, the court cannot try the issue and assess a fine against him. 6 Mo. Rep., 457; 9 ib., 696. It is exclusively the province of a jury to try the issue of not guilty, and the consent of the defendant for the court to try the same, cannot confer such power on the court.

For the foregoing reasons, the judgment of the Criminal Court ought to be reversed, and the other Judges concurring herein, the judgment is reversed.

SCOTT, J.—I am in favor of reversing the judgment of the court below, because the trial of the issue was by the court and not by a jury.

*Cousineau vs. The State.—Frazer, use of Chenowith, vs. Yeatman.*

COUSINEAU vs. THE STATE.

APPEAL from the St. Louis Criminal Court.

This case comes within the principles decided in the case of Patrick Neales vs. The State of Missouri. The judgment is reversed.

FRAZER, USE OF CHENOWITH, vs. YEATMAN.

1. Unless a bill of exceptions shews the evidence, the instructions of the circuit court based upon the evidence, will be presumed to be correct.
2. If one part owner of a steam boat invite a person to take an excursion upon the boat, he and not the person invited, will be liable to the other owners.

ERROR to St. Louis Court Common Pleas.

BEATTY, *for plaintiff.*

CROCKETT & BRIGGS, *for defendant.*

McBRIDE, J., *delivered the opinion of the Court.*

Frazer the plaintiff who sues to the use of F. G. Chenowith, brought an action of assumpsit in the court of Common Pleas of St. Louis county, against the defendant, James E. Yeatman. Plea, non-assumpsit.—Plaintiff took a non-suit, with leave to move to set the same aside, which he did, and his motion having been overruled, he excepted, and brought the case here by writ of error.

The bill of exceptions sets out the evidence which conduces to show, that in January or February, 1845, the defendant and his family went as passengers, on the S. B. Hannibal, from St. Louis to New Orleans, and back to St. Louis, for which he was charged \$115. That the charge

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*Frazer, use of Chenowith, vs. Yeatman.*

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was reasonable, and made so in consequence of the relation borne by defendant to one of the part owners. The plaintiff was captain and master of the boat at the time the trip was made, but not at the time when the suit was brought.

The bill of exceptions then proceeds to state, that "the defendant then offered to read in evidence the deposition of Harrison B. McKay, to which the plaintiff objected on the ground of irrelevancy, but the court overruled the objection, and the deposition was read in evidence, to which the plaintiff excepted. No other material evidence was given."

Thereupon the plaintiff asked the court to give the jury the following instruction: If the jury believe from the evidence, that the defendant was invited to take passage on the boat Hannibal, by one or more of the owners, without the assent of the other owner or owners, this is not a defence to this action. The court refused to give the instruction, but in lieu thereof instructed the jury that if they believed from the evidence, that the defendant was invited by any of the part owners of the steamboat Hannibal, to take the passage on board of said boat, to recover pay for which this action is brought, they will find for the defendant. The plaintiff excepted to the ruling of the court in refusing to give the instruction asked for by him, and also excepted to the instruction given by the court.

The plaintiff then took a non-suit with leave to move to set the same aside, which he did, and his motion having been overruled by the court, he excepted thereto, and sued out a writ of error from this court.

It will be seen that from any thing to the contrary appearing in the record, the instruction asked and refused, as well as the instruction given, presented an abstract question, wholly outside of the case. There is no evidence whatever of any pretext that the defendant went on board of the boat as a guest under an invitation given to him by one or more of the part owners of said boat. But we are left to infer that there was some such evidence in the deposition, which the defendant read in evidence to the jury, and to the reading of which the plaintiff objected, because the same was irrelevant. That deposition is not embodied in the bill of exceptions, nor copied any where in the record; how is this court then to ascertain, whether it was properly permitted to be read as evidence to the jury, or, that it raised the question embraced in the instructions?

If however the question raised by the instructions was properly saved in the bill of exceptions, we are not prepared to say that the court of Com-

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*Steerman vs. The State.*

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mon Pleas erred in expounding the law. Although the part owners of a steamboat are tenants in common, and one tenant in common cannot dispose of the vested legal interest of his co-tenant, yet he may appropriate to his own use more than his equal share of the profits accruing from such common property, he being liable over to his co-tenant for the excess. If therefore the defendant took passage on the steamboat Hannibal, under an invitation given to him for that purpose, by one or more of the part owners, the part owner thus giving the invitation, and not the defendant, would become liable to the other part owner.

The judgment of the court of Common Pleas is affirmed.

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STEERMAN vs. THE STATE.

The provision of the act regulating practice in criminal cases, which authorises the trial of a person guilty of larceny in this State, on board of any vessel in the course of any voyage, to be had in any county through which such vessel shall pass, or at which such voyage shall terminate, is constitutional.

APPEAL from St. Louis Criminal Court.

HENDERSON, *for Appellant.*

It is contended on the part of the appellant, that the judgment of the St. Louis Criminal court in this case ought to be reversed, and the prisoner discharged upon the points following:

- 1st. The State did not prove the *venue* as laid in the indictment.
- 2nd. The defendant was *charged with one offence and tried for another.*
- 3rd. The *law* upon which the indictment is founded is *unconstitutional.*

STRINGFELLOW, *Atty. Gen., for the State.*

1. That the indictment is in proper form, so far as the record shews.
2. The bill of exceptions does not set out all the evidence. From aught that appears in the record, the defendant may have had possession of the goods stolen in the county of St. Louis.—The question as to the jurisdiction of the court or the constitutionality of the act regulating the practice in criminal cases cannot be raised on the record.

The evidence not being preserved on the record, the court cannot look into the verdict.



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*Steerman vs. The State.*

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McBRIDE, J., *delivered the opinion of the Court.*

At the January term, 1846, George W. Steerman was indicted by the grand jury of St. Louis county, for grand larceny, and on a trial being had, was found guilty. He then filed a motion to set aside the verdict and grant him a new trial, for the following reasons:

1. Because the instructions of the court to the jury were erroneous.
2. Because the court refused to give the instructions asked by the counsel for the said defendant.
3. Because there was a material variance between the charge and the proof in the indictment.
4. Because the verdict was against the evidence.
5. Because this court has not jurisdiction of the offence as proved, the same not being committed on a river within the State of Missouri; which being overruled by the court, the defendant excepted, and judgment having been entered against him, he has brought the case here by appeal.

The indictment charges, "that George W. Steerman and Abraham Chavoisse, late of said county, laborers, on the first day of October last past, at St. Louis county aforesaid, one black cloth coat of the value of \$30; one black satin vest of the value of \$8, &c., &c., enumerating divers articles of clothing, a watch and money amounting in all to \$880; all the goods, chattles, money and property of one Adam B. Chambers, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute, &c."

The bill of exceptions contains the following summary of the evidence given upon the trial in the criminal court. The State proved that Geo. W. Steerman the defendant, stole the property charged in the indictment against said defendant, as the property of Adam B. Chambers, and the said property was stolen by said defendant on board the steamboat *Die Vernon*, on her trip down the Mississippi river, from Quincy, in the State of Illinois, to St. Louis city; and that said larceny was committed by said defendant during the month of October last, either whilst said *Die Vernon* was at the landing in Clarksville, in Pike county, Mo., or it was committed by said defendant on board of said steamboat, a short time after said boat had left Clarksville, in Pike county, Mo., on its voyage down the said Mississippi river to the city of St. Louis.

The counsel for the defendant then asked the court to instruct the jury: "That if they believe from the evidence that the property charged in the indictment against the defendant on the trial, as the property of

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*Steerman vs. The State.*

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one Adam B. Chambers, was taken out of the county of St. Louis, where the venue of said larceny is laid, they will acquit the defendant on the said indictment in its present form." Which said instruction the court refused to give, whereupon the defendant excepted.

In lieu of the foregoing instruction the court charged the jury, "that if you shall believe from the evidence that the defendant did steal the property mentioned in said indictment, or any part thereof, amounting to the sum of ten dollars or upwards, you will find him guilty, although you may believe that the said goods were stolen on board of a steamboat in the course of any voyage or trip, which terminated in St. Louis county, and that they were so taken between the stoppage of the boat at any point in this State, and the point of destination, (if that destination was St. Louis.) If you find the defendant guilty, you will fix his punishment by imprisonment in the Penitentiary for a term not more than five years. If you find him guilty, you will state in your verdict the value of the property stolen, and whether the same or any part of the same was returned." To the giving of which the counsel for the defendant excepted.

The indictment in this case is founded upon the 6th sec. 4th art. of the act to regulate proceedings in criminal cases. R. C., 1845, page 868, which reads as follows :

"When any offence shall have been committed within this State, on board of any vessel in the course of any voyage or trip, an indictment for the same may be found, and a trial and conviction thereon had in any county through which, or any part of which, such vessel shall be navigated in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate, in the same manner and with like effect as in the county where the offence was committed."

The question raised by the instruction asked for by the defendant, is whether the venue laid in the indictment is sustained or made out by the proof. The venue is laid in St. Louis county, and the evidence is that the theft was committed either in Pike county in this State, or on the Mississippi river, at some point between Clarksville and St. Louis.

The counsel for the defendant has referred us to no authority to sustain his objection. It is a common law rule that the venue must be proved as laid, and hence the forms in the books ; but it is competent for the General Assembly, to change, modify or alter the common law principle, and a reference to the section of the statute above cited, will show that a change has been made on this subject. This section is not the only anomaly in our criminal code, as for instance, the receiver of personal

*Montany vs. Rock.*

property that shall have been feloniously stolen, taken or embezzled, may be indicted, tried and convicted, in any court in this State, where he received or had such property, no matter where the theft was committed. So also, where a mortal wound shall have been inflicted in one county, and death ensues in another, the indictment, trial, &c., may be had in either county; and where the wound is inflicted in another State, and death takes place in this State, the indictment may be found in the county where the death happened. And a number of other similar statutory provisions might be cited, passed by the law making power of the State, and which we apprehend it was fully competent for them to pass. 2 Pick. R., 551.

We see no objection to the instructions given by the court to the jury. Judge NAPTON concurring, the judgment is affirmed.

## MONTANY vs. ROCK.

1. Parol evidence is not admissible to shew that a bill of sale of a slave, absolute on its face, is in fact a mortgage.
2. An instrument acknowledging the receipt of money for a slave, is not such a receipt as may be contradicted by parol testimony, so far as it evidences the sale of the slave.
3. A usurious contract under our statute is not void.

## ERROR to St. Louis Circuit Court.

*EAGER & HILL, for Plaintiff, insist:*

1. The circumstances show that the design of the defendant was to get the services of the slave for the use of the money; i. e., \$6 in services for \$3 33 interest, each month. The transaction was made to appear as a sale, to cover and disguise the usury. He who could exact the usury, could dictate the terms, and these were the terms the plaintiff was forced to accept. His favorite slave was surrendered with this receipt.

Usury is prohibited and will avoid a deed at law. See *Atwood vs. Whittlesey*, 2 Root's Rep., 37; *Hammond vs. Hopping*, 13 Wendell, 510-11; *Lear vs. Tarnell*, 3 Marsh., (Ky.) 420; *Wilhite vs. Roberts*, 4 Dana, 175;

Any illegality of consideration, or fraud, will avoid a deed at law. *Trustees vs. Dickinson*, 1 Dev. Rep., 189; *Mann vs. Eckford's ex'rs.*, 15 Wend., 518; *Parker vs. Parmlee*, 20 John. 134;

*Montany vs. Rock.*

Vrooman vs. Phelps, 2 John., 177; Dale vs. Rosevelt, 9 Cow., 307; Paxton vs. Popham, 9 East., 408; 1 Story's Eg., 261; Story's Com., 163; Russell vs. DeGrand, 15 Mass., 35; Kemper vs. Kemser, 2 Rand., 8; Cozzens vs. Whitaker, 3 Stew. & Porter, (Ala.) 329; Becker vs. Vrooman, 13 John., 301; State vs. Perry, 1 Wright, 662; Means vs. Brickwell, 1 Hill, (S. Car.) 657; Murphy vs. Trigg, 1 Monroe, 72; Lindley vs. Sharp, 7 ib. 248, 252; Thompson vs. Potter, 5 Litt. Rep., 74; Skinner vs. Miller, ib. 84; Edrington vs. Harper, 3 J. J. Marsh., 355; Moore vs. Kay, 1 Beat., 287.

A receipt in full of all demands is not conclusive, and may be explained by parol proof. See Story Justice, in Hardin vs. Gordon, 2 Mason, 561. So in Maze vs. Miller, 1 Wash., C. C. Rep., 328; Burrough vs. Partridge, 3 Verm. Rep., 144; Wright vs. Wright, 2 McCord's Rep., 192; Ensign vs. Webster, 1 John. Cas., 145; House vs. Low, 2 John., 378; Thorn vs. White, Adm. Dec., 128; Fuller vs. Crittenden, 9 Conn., 406; Jackson vs. White, 1 Am. Dec., 179; Thompson vs. Faussat, 1 Pet. C. C. Rep., 183; Putnam vs. Lewis, 8 Johns. Rep., 389; Johnson vs. Weed, 9 John., 310; Slangletor vs. Hamm, 2 Ohio Rep., 271.

*PRIMM, for Defendant, insists:*

1. That the plaintiff made out no case which could support his declaration. In every count, save the first, he alleges a borrowing of money, and a mere pledge of the slave as security, and to sustain them he proves a *clear and distinct sale* to Rock; that sale accompanied with possession in Rock.

2. The plaintiff endeavors to prove by Rock's declarations that this *sale* was only a *mortgage*, but the record does not show that the declarations were made *prior to*, or *at the time* of the execution of the bill of sale, so as to make them a part of the transaction. If Rock's declaration, as proven by the witness, Vai, was made after the sale, he is not legally responsible, because the declaration is without consideration. If the witness Strachan's testimony be construed to establish that Rock's declaration was made *at the time of the agreement* with plaintiff, it must also be taken as it was made. Rock said "*that if plaintiff was able to redeem the slave with his own means, he should have the right to take her back, but he should not have the right to get the means any where else.*"

3. Supposing the tender of the money to Rock was a proper tender, it should have been made good by bringing the money into court,, which was not done.

4. But the alleged tender was not sufficient, because,

First, Only \$400 was tendered to Rock, when he was entitled to interest besides, for a period of nearly four months;

Second, The tender was made by a stranger, with a stranger's funds, in which Montany had no interest and of which he had not even a possession;

Third, Under these circumstances, the tender was made in a manner which was at variance with the terms stated by Rock upon which the supposed right of redemption was to accrue.

5. The instruction given by the court was tantamount to an exclusion of the testimony offered by plaintiff to vary the terms of the bill of sale from Montany to Rock.

Such testimony was not admissible. Greenleaf on Evidence, p. 327, sec. 275 and following; Lane vs. Price, 5 Mo. R., p. 101; Benson vs. Peebles, ib., 132.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of trover, brought by the plaintiff against the defendant in error, to recover a female slave. The plaintiff conveyed to

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*George Glascock vs. The State.*

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the defendant the slave in controversy by an instrument of which the following is a copy: "Received, St. Louis, Aug., 1843, of Philip Rock, the sum of \$400, being in full for my slave Maria; the said Maria mulatto girl, aged 15 years; the said Mary slave for life. L. MONTANY."

Parol evidence was offered, tending to show that the transaction was only a mortgage, and designed as a security for the sum of \$400, loaned by the plaintiff to the defendant. Evidence was also produced to show that the services of the slave were worth more than the interest of the money, with a view to avoid the contract as usurious and contrary to law. Before the institution of the suit, the four hundred dollars were offered to be returned to the defendant.

Under an instruction from the court, verdict and judgment were rendered for the defendant.

This case does not fall within the principle of those which admit parol evidence to explain a receipt. The instrument evidencing the sale of the slave, although containing an acknowledgment of the receipt of the purchase money is clearly a bill of sale, absolute and unconditional; and, according to the case of *Hogel vs. Lindell*, decided at this term of the Court, parol evidence was not admissible to convert it into a mortgage.

Nor does the general principle that a contract in violation of law cannot be made the foundation of an action, apply to contracts affected with usury, under our laws regulating the interest of money. Those laws do not avoid usurious contracts. They expressly recognise the right of the plaintiff to a recovery, after deducting the penalty for usury, and in this respect are different from some usury laws which render the contract void. *DeWolf vs. Johnson*, 10 Wheat., 367.

The other Judges concurring, the judgment will be affirmed.

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GEORGE GLASCOCK vs. THE STATE.

Rondo held to be a game of chance.

APPEAL from St. Louis Criminal Court.

McBRIDE, J., delivered the opinion of the Court.

George Glascock was indicted in the Criminal Court of St. Louis county, at the July term, 1844, for setting up and keeping a gambling



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*George Glascock vs. The State.*

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device, commonly called Rondo. A trial was had at the subsequent term, and the defendant was found guilty and a fine assessed against him. The defendant moved for a new trial and in arrest, which having been overruled, he excepted and brings the case here by appeal.

The bill of exceptions, after detailing the evidence given upon the trial, goes on to state that "the Circuit Attorney, in his concluding argument having stated to the jury that the object of the Legislature in passing the act under which the defendant was indicted, was to prevent the practice of money making games, and that the game of Rondo was a money making game." The defendant, by his attorney, moved the following instruction: That the question before the jury was not whether the game of Rondo was a money making game, but whether it was a game of chance. But the court overruled the instruction, and refused to grant it because there was no evidence to justify it, and because it was an instruction founded upon the argument of the State's Attorney; to which opinion of the court, in refusing the instruction aforesaid, the defendant, by his counsel, excepted.

The court afterwards, at the instance of the defendant, gave the jury the following instructions: "If the jury shall find from the evidence that chance enters into the game of *Roundeau*, but that there is more skill than chance in it, so as to characterize it a game of skill, they ought to find the defendant not guilty.

If they have reasonable doubt whether Rondo is a game of chance or a game of skill, they ought to find the defendant not guilty."

The court also instructed the jury, of its own accord, as follows: "To convict the defendant, you must be satisfied from the evidence that the defendant did set up the device in question; but if you shall believe from the evidence that the defendant was the keeper of the device in question, or had control or management of it, this will be sufficient evidence of the setting up of said device. And also to convict the defendant, you must be satisfied from the evidence that the device is such as was devised, adapted and designed to play a game of chance, and that the game of Rondo is a game of chance."

From a review of the instructions given by the court to the jury, at the instance of the defendant's counsel, as also those given by the court of its own accord, and which were not objected to by the defendant, it appears that the law of the case was given to the jury, at least as favorably to the defendant as he was entitled to have it expounded. The objection appears to be that the court would not by its instruction counter-

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*Clark & Swasey vs. Stevens.*

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act the possible undue influence made on the minds of the jury by the arguments of the prosecuting attorney. In this objection, we think there is no weight. The refusal of the court to give the instruction, might perhaps have had some influence with the jury, by producing the impression that the court sanctioned the interpretation of the statute, given to it by the Circuit Attorney, if the court had not subsequently given instructions manifesting clearly the opinion of the court on the proper construction of the law.

The question of fact whether the game of Rondo is a game of skill or a game of chance, was left to the jury, who, from the evidence before them, found their verdict. From an examination of that evidence, we find nothing upon which to hang a doubt of the correctness of the finding of the jury.

Wherefore, we are of opinion that the judgment of the Criminal Court ought to be affirmed. The cause is remanded to that court, with directions that the court proceed to enforce its judgment.

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CLARK & SWASEY vs. STEVENS.

Where a cause is submitted to a court sitting as a jury, and the court is not called on to decide some question of law, its judgment will be affirmed.

ERROR to St. Louis Court of Common Pleas.

HAMILTON, for Plaintiffs, insists:

1. Stevens could not sell or in any way act under a writ directed to and in the hands of Paulding, nor could he make any such agreement to the prejudice of the plaintiffs, as he sets up in his answer. 10 Peter's Rep., p. 400.

His attempt to sell under Paulding's writ as alleged was abortive, and the boat, in fact and law, was never sold on Paulding's writ. 1st Halsted's Rep., 228.

Stevens could not act as Paulding's deputy, unless appointed according to law. Rev. Stat. 1835, p. 116, sec. 5, and p. 19, sec. 32.

Admitting that Stevens could act as the crier or auctioneer of Paulding, without having been appointed his deputy according to law, he nevertheless was bound by the command of *his own* writs, to sell the whole boat, to satisfy them, and could make no valid agreement, that part of the

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property should go to satisfy Paulding's—his own being unsatisfied. 6 Halsted's Rep., 346; 10 Peter's Rep., 400; 2 Vt. Rep., 270; 3 Marshall Rep., 359.

It was Stevens' duty to sell the whole boat, if necessary, to satisfy his own writs in full, if the proceeds were sufficient. This he has not done, but illegally paid the sum of \$67 75 to Paulding, and in making the returns which he has, he has made false returns.

2. Semple's writ was not entitled to payment as a first class claim, even if the position above contended for should be held untenable, for the plaintiff's writs were endorsed by the justice issuing them, of the *second* class, while Semple's was not classed at all by the justice, and therefore it should have been postponed to all writs that had been endorsed by the judicial officer.

Plaintiffs contend that the classification of the claims against a boat is a judicial act, and to be performed by the court rendering judgment; and when the court has fixed the class, the executive officer (the Constable) is bound by it, and must pay the proceeds in accordance with the court's classification. Plaintiffs' claims were placed by the justice in the second class, and Stevens should have paid them as such. Semple's claim was not classed by the justice, and the constable, being only a ministerial officer, had no authority to determine its class. All claims that had been classed by the court should have been fully paid before Semple's was entitled to receive anything. If Semple claimed the privilege of a first class creditor, it was his duty to have got the justice to place his claim in the first class, and to have delivered it as such to the constable. As he failed to do this, the law presumes that he was not entitled to the privilege of a first, second, or third class creditor, but that he belonged to the lowest class known to the law.

3. Admitting that the constable was not bound by the classification of the justice—that he had a right to determine the class of the different claims, and could, for this purpose, refer to the causes of action filed before the justice—even then, Semple's claim was wrongfully paid a first class claim. His judgment was founded on a note purporting to be given for services rendered to the boat by Semple. This comes within no class named in the statute; certainly not in the first.—Plaintiffs' claims, it is admitted, were for stores and supplies furnished the boat. They, then, were clearly in the second class, and to their payment Stevens should have applied the \$67 75.

4. Semple's judgment and execution were void. Stevens, under the plaintiffs' warrants, and others directed and delivered to him, levied on the whole boat, and took her, and all appendages, into his possession, on the 20th of August, 1844. Paulding claims to have made a levy on the 21st of August, a day later than Stevens levied. Plaintiffs say that Stevens having, on the 20th August, taken the whole boat into his possession, Paulding could make no legal levy. See R. S. 1835, p. 256, sec. 18, and Acts of 1839, p. 44, sec. 5; 6 Halsted's Rep., 218; 16 John. Rep., 287, showing what constitutes a good levy.

If Stevens, by virtue of his levy on the 20th, had the boat in his custody and exclusive control, then Paulding could make no levy on the 21st. If Paulding did make a good levy on the 21st, then Stevens was guilty of an escape of the property; and in this event, his return was false.—See 8 Martin's Rep., new series, p. 664.

**EAGER & HILL, for Defendant, insist:**

That the evidence does not prove any false return made by defendant on the plaintiffs' orders of sale—

1. Because Paulding held and controlled as an independent officer the Semple order of sale, and although defendant acted as crier at the sale, and received the proceeds of the boat, yet Paulding applied the money on the Semple judgment, and paid it off as a lien of the "first class," and this defendant is not bound by the acts of Paulding in that behalf, for he had no control over Paulding or the Semple judgment or order of sale.

2. If there be any doubt as to the preceding point, this defendant insists that the judgment in the

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Sample case was on a note for services rendered to the boat, and that it was lawfully paid off in the "first class," unless notice was given defendant that it was not a first class lien before Paulding paid it off.

3. The plaintiffs received the 59 per cent. on their orders of sale, and gave their receipts therefor, without giving defendant any notice of their claim to any part of the proceeds, which had been applied to the payment of the Sample judgment.

4. The Sample judgment appeared on its face to be a judgment rendered on a first class lien, and it was paid as a first class lien, without any notice to the defendant that it was in fact a "second class" lien—and therefore this defendant ought not to be charged, for he acted in good faith and obeyed the statute to the best of his ability. This defendant was not authorized and could not go behind the judgments to ascertain what liens were in the first or second classes. He was bound by law to pay the judgments according to their classes and as they were classed in the record.

5. But admitting that there was error in the appropriation of the money by Paulding on the Sample judgment, and that this defendant was in some form of action liable for permitting such an appropriation, the evidence does not sustain the charge against defendant of a "false return," and the plaintiffs, after receiving their per centum, (without notice of a claim to the money in the first class liens) are estopped from making such a charge.

*McBRIDE, J., delivered the opinion of the Court.*

This case was submitted to the court sitting as a jury, partly on facts agreed, and partly on oral evidence, when the Judge found a verdict for the defendant, to which finding and judgment thereon the plaintiff excepted and sued out a writ of error.

Although several questions of law might readily arise on the facts and evidence in the cause, yet the Court was not called upon to decide any, and we cannot learn from the record the grounds upon which the case was decided. How is this Court, then, to review the decision of the Court of Common Pleas? Which of the various points of law properly belonging to the case, is this Court to affirm or reverse the judgment upon? We cannot tell. It is the duty of the party complaining of a judgment of the court below, so to prepare his case in that court as to be enabled, when the record comes into this Court, to shew conclusively and at once wherein there was error.

This case falls within the doctrine laid down in 8 Mo. R., 701, 709; 9 Mo. R., 48, 49, 291, 355, 397.

The judgment of the Court of Common Pleas is therefore affirmed.

*SCOTT, J.*

In my opinion, the evidence in this case does not show that the constable was guilty of a false return. I am therefore in favor of affirming the judgment.

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*Slater vs. Steamboat Convoy.*

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## SLATER vs. STEAMBOAT CONVOY.

1. An appeal from the judgment of a Justice of the Peace, is not taken until a recognizance is entered into and approved by the Justice, although it may be entered on the docket of the Justice that an appeal was applied for, and allowed on the day of trial.
2. Where an appeal is taken after the day of trial, and no notice given to the appellee, the cause will not be for trial at the first term of the circuit court, unless the appellee enter his appearance on the first day of the term.

## ERROR to St. Louis Court of Common Pleas.

**PRIMM & TAYLOR, for Plaintiff, insist:**

1. The plaintiff in error has adopted the proper remedy, if the court below erred in its judgment in granting a new trial, by abandoning his case. *Davis vs. Davis*, 8 Mo. R., 56.
2. That the court below did err is apparent from the record, for the appeal appears to have been taken on the same day the trial and judgment was had before the Justice. Rev. Code 1845, p. 670, §. 21; Rev. Code 1845, p. 316, §. 9.
3. There is nothing in the record showing that any amendment of the transcript was ordered by the court below, or prayed for by the defendant, nor is there anything connecting the supposed amendment by the Justice with this case, as he only certifies that in a case carried to the Common Pleas, &c., and not that in this case the facts exist.
4. That the transcript being filed in the clerk's office on the 20th day of August, and the court below meeting and commencing its term on the third Monday of September, taken in connexion with the testimony of the attorney in the case, shews that as his name was placed on the docket, it must have so been placed there before or on the first day of the term, and if so this is an appearance, and the case was properly tried.
5. That although the appellant should fail to give notice to the appellee of said appeal, yet it is optional with the appellee to try or continue the case as the statute is discretionary. Rev. Code 1845, 679; §. 20 and 22.

**WRIGHT & SHREVE, for Defendant,****McBRIDE, J., delivered the opinion of the Court.**

Slater instituted an action before a Justice of the Peace against the steamboat Convoy, for work and labor done in and upon the building of said boat, where he obtained judgment, from which the defendant appealed to the court of Common Pleas, where judgment was again rendered in his favor; which being subsequently set aside, on motion of the defendant, the plaintiff excepted, took a non-suit, moved to set the same



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aside, which being overruled, he excepted and sued out a writ of error.

The three bills of exceptions taken in the case show, that the judgment was rendered by the Justice of the Peace on the 6th May, 1845, and that on the same day the defendant prayed an appeal, and the Justice granted the same, but that the appeal was not consummated, by the execution of a bond, until the 8th May. That at the first term of the court of Common Pleas thereafter, the court tried the cause and rendered judgment against the defendant; that within four days after such judgment, the defendant moved the court set aside said judgment, assigning among other, the following reasons, to wit: "Because said cause was irregularly and illegally brought to trial at this term of the court—because the said plaintiff did not enter his appearance to the case on the first day of this term."

The plaintiff contends, that the appeal having been taken on the day of trial before the Justice of the Peace, that no notice was necessary, and that the case stood regularly for trial at the first term of the court of Common Pleas thereafter, without his entering his appearance to the action, on the first day of said term. The statute is different.

Notwithstanding a party may pray an appeal, from a judgment rendered against him, before a Justice of the Peace, on the day of the rendition thereof, and the Justice may enter that fact on his docket, and enter moreover on his docket, that the appeal is granted, yet according to the provision of the statute, there is no appeal until a recognizance has been entered into and received the approval of the Justice. The appeal then in this case was taken on the 8th day of May, two days after the trial before the Justice. What then was the duty of the appellant? The statute provides that when the appeal is not taken on the day of trial, the appellant shall ten days before the next term of the court to which the appeal is returnable, serve the adverse party with a notice of such appeal. But, to prevent the party appealing, from using his appeal for the purpose of delay, it is further provided that if the appellant shall fail to give the notice required, that the appellee may come into court and enter his appearance, and that, if he does so on the first day of the term, the cause will stand for trial at such term as though the notice had been duly given.

In this case no notice was given by the appellant of his having taken an appeal, nor did the appellee enter his appearance whereby notice might have been dispensed with, but in the absence of both requisitions, the court rendered judgment against defendant.

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*Crockett vs. Morrison.—Floersh vs. The Bank of Missouri.*

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The judgment was clearly irregular, and the court of Common Pleas did right in setting the same aside, when its attention was called to the irregularity, and in doing so imposed no legal constraint on the plaintiff to take a non-suit.

Judgment affirmed.

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CROCKETT vs. MORRISON.

See case of Laurent vs. Mullikin.

ERROR to St. Louis Court of Common Pleas.

McBRIDE, J., *delivered the opinion of the Court.*

There has been neither an assignment of errors nor brief of counsel in this cause, but from an examination of the record, we find the case comes within the principles decided at the present term, in the case of Julie Laurent, *et al.* vs. Charles Mullikin. The judgment of the court of Common Pleas is affirmed.

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FLOERSH vs. THE BANK OF MISSOURI.

1. Unless the giving or refusing instructions, or admitting or rejecting evidence, be made the ground of a motion for a new trial, the action of the Circuit Court as to those matters will not be looked into.
2. Unless the action of the Court in giving or refusing instructions, or in admitting or rejecting evidence, be excepted to, its action upon those questions cannot be brought into question by a motion for a new trial.

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*Floersh vs. The Bank of Missouri.*

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## ERROR to St. Louis Circuit Court.

CARROLL &amp; GIBSON, for Plaintiff.

POLK, for Defendant, insists:

1. The bill of exceptions in this case, does not on its face purport to contain *all* the evidence in the cause.

But unless the bill of exceptions gives all the evidence in the cause, this Court upon the authority of its own decisions "will not interfere with the decision of the Circuit Court and order a new trial"—*Vaughan vs. Montgomery*, 5 Mo., 529; *Hughes vs. Ellison*, 5 Mo., 110.

2. The instructions given by the court below, were not excepted to by the plaintiff, and nothing occurring on the trial can be assigned for error in the Supreme Court, except what was made the subject of exception in the court below. *Swearingen vs. Newman*, 4 Mo. R., 456; *Robinson & McMurray vs. Shepard*, 8 Mo. Rep., 136; *Vaulx vs. Campbell, ex'r.*, 8 Mo. Rep., 224; *Shelton vs. Ford, et al.*, 7 Mo. R., 209.

3. Nor is this cured by the motion for a new trial in this case. For it is not assigned as a reason in support of that motion, that the court give illegal instructions to the jury. And even if exception had been taken to the instructions at the time they were given, the plaintiff could not avail himself of any error committed in giving the instructions, unless he had moved for a new trial and assigned as reason for his motion the giving such illegal instructions. *Higgins vs. Breen*, 9 Mo. Rep., 501.

4. Even if the Circuit Court erred in not permitting the witness to state the grounds of the nonsuit in the case of *Floersh vs. Hoiltzle*, see pages 33 & 35 of record; still, as the bill of exceptions does not contain *all* the evidence, the plaintiff in error cannot avail himself of that error in this Court. *Magehan vs. Orme & Spears*, 7 Mo. R., 4.

McBRIDE, J., delivered the opinion of the Court.

Jacob Floersh brought an action of assumpsit against the Bank, in the Circuit Court of St. Louis county. The declaration beside the common count, contained several special counts, charging that the plaintiff deposited with the Bank for collection, a negotiable promissory note, dated the 10th February, 1842, payable two months thereafter, at the said Bank, for the sum of \$550, executed by one Loimstroom to Charles F. Hoetzel, and by him endorsed to Edward Warrens, and by said Warrens endorsed to the plaintiff; which said note so deposited with the said Bank, the Bank failed to have presented and duly protested for non-payment until the 14th April, 1842, whereby the endorsers were released from their liability, &c. A trial was had which resulted in a verdict and judgment for the Bank, whereupon the plaintiff moved to set aside the verdict, and for a new trial for the following reasons, to wit:

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*Floersh vs. The Bank of Missouri.*

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1. Because the verdict of the jury was against law and evidence.
2. Because the jury decided and rendered their verdict against evidence and the weight of evidence.

The court overruled the motion, to which decision of the court the plaintiff excepted, and has brought the case here by writ of error.

Several questions arose on the trial in the court below, to the decision of which the parties respectively excepted, but as those excepted to by the plaintiff have not been saved in the bill of exceptions, nor assigned in his motion as reasons for a new trial, we are left to presume that they were subsequently abandoned. However that may be, it is manifest that the attention of the Circuit Court was not directed to them, and an opportunity afforded that court, by granting a new trial, to correct the errors, if any had been committed in the progress of the trial. It is due to that court, as well as to the speedy and cheap administration of justice and the convenience of parties litigant, that such an opportunity should be afforded. This could only be done in this case, by a motion for a new trial.

In disposing of the motion for a new trial, the Circuit Court would only pass upon the sufficiency of the reasons assigned and not review its decision upon other questions, not presented in the motion. If this court should now go behind the motion, to see if other reasons do not arise on the record to authorize a reversal of the judgment, it would be deciding the case upon other and different grounds than those submitted to and decided by the Circuit Court, and would very properly subject this court to the imputation of permitting parties to raise new issues here, and have their cases decided upon points entirely different from those decided in the Circuit Court. This would be a perversion of the duties of this court.

Moreover, the only complaint made by the plaintiff, is that the verdict is against evidence and weight of evidence and against law; the defendant has reason therefore to conclude, that those are the only grounds, upon which this court will be invoked to reverse the judgment of the Circuit Court, and consequently comes here prepared to sustain the verdict as being in conformity with the evidence, and the law of the case. But, instead of relying on the issue thus made, the plaintiff endeavors to create a new issue, upon either the improper exclusion or admission of evidence, or the wrongful giving or refusing instructions, thus taking the defendant by surprise, and perhaps unprepared to meet the case in this new aspect.

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It is assigned for error, that the verdict of the jury is against evidence, the weight of evidence and against the law.

What principle of law has been violated? It cannot be *that* contained in the instruction of the court, for the instruction not having been excepted to on the trial, must be regarded as containing a correct exposition of the law of *this case*.

After the repeated adjudications of this court, refusing to set aside verdicts and grant new trials, where there is contrariety of evidence, it would appear unnecessary to notice this assignment of error at this time, nor would it now be considered or commented upon, but for the purpose of pointing out an omission in the bill of exceptions. The bill of exceptions after setting out the testimony of several witnesses, examined in open court, and an exemplification of a record in the case of *Floersh vs. Warrens*, a prior endorser of the note sued on, concludes as follows: "The defendant introduced no testimony, and on the plaintiff's evidence being closed, asked the following instructions." This is by no means conclusive that the evidence set out is all that was offered by the plaintiff on the trial. It is stated that the defendant offered no evidence, and that far, it is sufficient; but what follows only shows that the plaintiff asked certain instructions after he had closed his evidence, and whether the whole evidence offered by the plaintiff is embraced in the bill of exceptions is left to inference. The language used is consistent with either state of facts, and leaves this court in doubt, whether the whole or a part of the evidence is embodied in the bill of exceptions, 5 Mo. Rep., 110, 529.

We are led to the conclusion, from an examination of the evidence set out, that a portion of the evidence given upon the trial, is omitted, otherwise the plaintiff offered no evidence of legal title to the note sued on, at the time of commencing his suit, except the possession of it. He was once the owner by purchase from *Warrens*, to whom it was endorsed by *Hoetzel* the payee thereof; but the plaintiff's name appear on the back of the note as endorser, and also the names of *Kimm, Tewes & Harves*, in pencil, and the note was by them deposited in the Bank for collection. How did they become possessed of the note? They must have acquired it from the plaintiff by his endorsement, and if so, then the legal title to the note in question was in them, and the plaintiff failed to establish his right to maintain his action against the Bank.

For the foregoing reasons, the judgment of the Circuit Court ought to



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be affirmed, and the other members of the court concurring in the affirmation, the judgment is affirmed.

NAPTON, J.

Where a motion for a new trial presents as a ground for the action of the Circuit Court, that the verdict is against law, the propriety of the instructions given or refused, is involved in the determination of that question. Had the instructions in this case been excepted to, I should think the motion for a new trial sufficient to bring up all the points designed to be raised. I concur in affirming the judgment.

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THE BANK OF MISSOURI vs. BENOIST & HACKNEY.

1. An action for money had and received may be maintained for currency.
2. On a promise made by A. to B. on a valuable consideration, for the benefit of C., can C. maintain an action?
3. A demand is not necessary to entitle a party to recover money deposited with the Bank, after the Bank had rendered an account claiming the money as her own.
4. An express demand is necessary to entitle the depositor to recover 20 per cent. per annum from the Bank for failing to pay the deposit.
5. It is not every failure by the Bank to comply with its engagements that will subject it to the penalty of 20 per cent.

In what case is it liable or exempt?

ERROR to St. Louis Common Pleas.

POLK, for Plaintiff, insists:

1. The court below erred in overruling defendants' motion to exclude the deposition of A. P. McCready. *Nightingal vs. Duisme*, 5 J. Bur., 2594; *Perkins, adm'r. vs. Dunlap*, 5 Greenleaf's R., 268; 1 Chit. Pl., 384, and notes x and y; 1 East., 1; 2 W. Blk. Rep., 684.
2. The court below ought to have given the first instruction prayed by defendants' counsel, and committed error in refusing it. In this instruction, the court is merely asked to tell the jury that

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the plaintiffs must prove that the defendant was indebted to them, as they had charged in their declaration—or, in other words, that they must prove the allegations of their declaration. With the general issue in, I can hardly imagine how it could be supposed that the plaintiffs could recover *without proof*, and proof, too, commensurate with the claim asserted by them.

3. I will consider the second instruction prayed by defendants' counsel and refused by the court, and the third instruction given by the court, together; for they both refer to the same matter and involve the same principles.

And I maintain that the Court of Common Pleas committed error both in refusing the first and in giving the last.

The first asserts, that if currency was deposited by the defendant with plaintiffs, they cannot recover in this action, unless defendant received it as specie or converted it into specie.—The other asserts, that plaintiffs cannot recover unless, after the balance was struck in plaintiffs' bank book, and before the institution of the suit, defendant undertook to pay in specie all sums then on deposit as currency.

That the first instruction is right, I refer to the argument and the authorities cited on the admissibility of McCready's deposition.

That the other instruction is wrong, is evident from the following considerations:

First. In the first place, the instruction gives to an agreement which has no consideration to support it, the effect of changing currency into specie. For it does not require the undertaking which it makes potential to that extent and to that effect to be based upon any consideration whatever.

Second. In the second place, for the balance in her hands on the 27th of May, 1842, which was currency or bank notes, the Bank could not be responsible in specie or money—because any agreement by which she undertook to consider such currency as specie, and thereby to render herself liable for a larger amount by from 3 to 5 per cent.—even supposing any such agreement to have been proved in this case—would have been without consideration, and therefore not binding on her. *Marks vs. the Bank of Missouri*, 8 Mo. R., 316.

4. The third and fourth instructions prayed by defendant's counsel, and refused by the court, assert the converse of the proposition asserted in the second instruction given by the court.

The court erred therefore in refusing the two former, for the same reasons that it erred in giving the latter one.

On this point, therefore, I refer to the argument and authorities adduced on the 7th point, which is upon the second instruction given by the court.

5. The first instruction given by the court below is erroneous, because it takes for granted facts which were not proved.

The bill of exceptions nowhere shows either that the plaintiffs ever made any demand on defendant for the balance of deposits in her possession, or that the defendant ever refused to pay the same when demanded. Yet all this is expressly and fully assumed in the instruction given.

And that it is error in the *Nisi Prius* Judge to give an instruction when there is no evidence upon which to predicate it, see *O'Fallon vs. Boismenn*, 3 Mo. Rep., 405; *Vaulx vs. Campbell*, ex'r., 8 Mo. Rep., 224. That a demand was necessary, and that the interest of 20 per cent. after proof that a demand had been made, see section 35 of the Bank charter.

Again, we have seen that the balance in favor of plaintiffs in the hands of defendant was payable in currency. Now, even though there had been a demand proved of this balance, and refusal to pay it by the defendant, still, by the 35th section of the Bank charter, this would not render the Bank liable to pay interest of 20 per cent. upon the amount, unless, indeed, such balance had become specie in the hands of defendant, and had been demanded and refused after that time.

But that such balance had not become specie in the eye of the law, is shown by the argument and authorities adduced under the fourth point.

6. But this being an action brought by depositors against their banker, for a balance of deposits, in order to entitle them to recover at all, it was necessary to have proved a demand. *White vs. the Franklin Bank*, 22 Pick. Rep., 181.

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And this point was put to the court below, and its action thereon is presented by the record so as to be a matter upon which error can be assigned in this court.

The counsel of defendant, (Mr. Hudson) on the close of plaintiffs' case, moved the court to non-suit the plaintiffs, on the ground that there was no evidence to sustain the declaration. This motion presented two demands to the court—not only, first, to non-suit the plaintiffs, but also, secondly, to declare to the jury that there was no evidence to sustain the declaration. But the court refused to allow both demands—refused to say that there was no evidence to sustain the declaration, as well as to non-suit the plaintiffs.

Now, if the proof of demand was necessary to support the action—and we have seen from the authorities cited that it was—then it was true in law and in fact, that there was no evidence to sustain the declaration, and the Court of Common Pleas *erred* in refusing so to declare to the jury.

7. The court below erred to the prejudice of the defendant in giving the second instruction.—1 Chit. Pl., 5 and 6, *Marchington vs. Vernon*, cited in note c, to 1 Bos. & Pul., 101; *Martyn vs. Hind*, Doug., 142, and *Cowper*, 437; *Carnegie vs. Waugh*, 2 Dow. and Ry., 277; (16 Eng. C. L. R., 85;) *Fenner vs. Mears*, 2 Blk., 1269; *Garrett, et al. vs. Hendley*, 4 B. & C., 664; (10 Eng. C. L. R., 438.)

**GAMBLE & BATES, for Defendants, insist:**

1. As to the bill drawn by Anderson on Durst, and sold to the Bank, there was no privity between the Bank and Benoist & Hackney, and so the Bank could have no interest in any contract between Anderson and B. & H., for the protection of the bill in New Orleans.

2. But the contract was never fulfilled on the part of Anderson. He did not furnish the money in St. Louis to take up the bill. He did advance some money, but not enough, and for that he might have maintained an action for money had and received. But in that action, B. & H. would have had a good plea of set-off, as the same testimony shows that Anderson owed them \$10,000.

3. The action of assumpsit on money counts may be maintained for a transaction and the settlement of an account in currency. 9 Wheat. R., 651; 6 Mass. R., 182; 7 J. R., 132; 6 Cowen, 299; 7 Cowen, 662.

4. The instructions are very defectively stated in the transcript. The first instruction on the part of the defendant, and which seems to be refused, we suppose is relied upon. That instruction, in the form in which it now appears, is a trite legal truism, the refusal of which, if it were indeed refused, could not prejudice the defendant, for the other instructions plainly show the ground on which the court put the case.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of assumpsit on the common counts, brought by Benoist & Hackney against the Bank, for money deposited. Pleas, non-assumpsit, set-off on the general counts, and payment. On the trial, the plaintiff obtained a verdict and judgment.

Benoist and Hackney deposited in the Bank of Missouri depreciated bank notes, called, in the language of those days, "currency." There were dealings to a large amount between the defendants in error and the Bank. The accounts were kept in currency, and currency consisted of

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bank notes which were current, yet from 3 to 5 per cent. less in value than specie. During the time of these dealings, J. J. Anderson drew a bill on J. P. Durst in New Orleans for \$8000, and Benoist & Hackney agreed with Anderson to protect this bill. The bill was discounted by the Bank, but it does not appear that she had any knowledge of the existence of the contract between Benoist & Hackney and Anderson at the time the bill was discounted by her. The bill being dishonored, it was taken up by the Bank, and she charged the amount of the bill and damages, being \$3,300, to Benoist & Hackney, and withheld that amount of their deposits from them. For this sum, this suit was brought. The consideration of the promise made by Benoist & Hackney to Anderson was a bill for \$3,150, drawn on the St. Louis Perpetual Insurance Company. This bill was dishonored, and afterwards taken in by Anderson, who paid from 8 to 1200 dollars to Benoist & Hackney, and gave other bills to them for the balance, which it does not appear were ever paid. At the time of these transactions, Anderson was largely indebted to Benoist & Hackney, and before the promise above mentioned was made by them, they had directed their clerk not to credit Anderson without good security.

Before the institution of this suit, the Bank had ceased to deal in currency, and had given notice of that fact. There was no evidence of an express demand made by Benoist and Hackney on the Bank before the bringing of the suit. After the plaintiffs' evidence had all been produced; the defendant moved the court to instruct the jury that on the testimony in the cause the plaintiffs were not entitled to recover. This instruction was refused. The defendant then asked the following instructions, viz:

1. "The defendant prays the court to instruct the jury that unless they are satisfied from the evidence that, at the time of the institution of this suit, the defendant was indebted to the plaintiffs for one of the causes specified in the declaration, they should find for the defendant."
2. "That evidence of the defendant having on deposit current bank notes belonging to the plaintiffs, will not support a declaration for money, unless they should be satisfied that such bank notes were received by the Bank as money, or by the defendant converted into money, either of which it is incumbent on the plaintiffs to prove."
3. "If the jury believe from the evidence that John J. Anderson paid the amount of the bill of exchange, negotiated at the Bank by said Anderson, to the plaintiffs, they should find for the defendant."

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4. "If the jury believe that the money and checks spoken of by Anderson were paid by him to the plaintiffs, for the purpose of settling the bill aforesaid, that the said plaintiffs had no right to appropriate the same to any other purpose;" which were refused.

The court thereupon gave the following instructions, viz:

1. "That if the jury believe from the evidence that the defendant received money on deposit of the plaintiffs, and refused to pay the same to them, when demanded, they will allow the plaintiffs interest on the same from the time of such demand and refusal to the present time, at the rate of twenty per cent. per annum."

2. "There is not before the jury any lawful and competent testimony proving or tending to prove that the two items of \$3,000, and one of \$300, charged against the plaintiffs in the bank book, (which has been given in evidence) are properly chargeable against said plaintiffs."

3. "That the jury will find for defendant, unless they believe from the evidence that the defendant, subsequent to the 27th of May, when the balance was struck in plaintiffs' bank book, and prior to the institution of this suit, undertook to pay all sums then on deposit in money."

Exceptions were taken to the refusing and giving these instructions.

The first question presented for our consideration is, whether an action for money had and received could be maintained in this case, as the deposits made by the plaintiffs consisted of bank notes of less value than specie. There is no doubt of the general principle that in order to maintain an action for money had and received, it must appear that money has been received for the use of the plaintiff. Thus, it has been held that the action will not lie for stock; but, on the other hand, it has been said it will lie for foreign securities or paper money, if there has been an opportunity of converting them into specie. 1 Leigh, N. P., 46. So when property received by the defendant is readily converted into money, and his conduct affords a presumption he has so converted it, it may be recovered in this form of action: Longchamp vs. Kenney, Doug., 137. It has been determined that the action will lie on a note payable in foreign bills. Young vs. Adams, 6 Mass., 182. Although currency was a little below specie in value, we all know that it was regarded as money, and the resolution of the Bank to cease dealing in currency, afforded ample inference that all such paper as constituted currency had been converted into specie. It was said in the argument that this Court, in the case of Farwell vs. Kennett, 7 Mo. Rep., had decided that a bill payable in "currency" was not a bill payable in money, so as to make it a negotia-



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ble instrument under our statute. That opinion is adhered to and does not conflict with any thing said herein. The present question does not depend upon the quality of the notes, whether negotiable or not, but whether currency was regarded as money by the parties. A bill of exchange, if restricted to a mode of payment liable to any uncertainty in the amount or value to be paid, is not negotiable by the statute or by the custom of merchants. The bill in that case being made payable in currency, and currency being under the value of specie, and its value fluctuating, it could not be considered such an instrument as is made negotiable by the law merchant. But, although in that point of view, currency would not be regarded as money, yet that does not prevent its being so considered in an action for money had and received against a person who detains it from another. 6 Mass. R., 188.

Another question arising in this case is, whether the Bank can maintain an action on the promise made by the defendants to Anderson to protect the bill drawn by him on Durst, which was discounted by the Bank. The position that when one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit, may maintain an action for the breach of such engagement, is supported by a weight of authority in the American courts which we are not at liberty to disregard. *Schamerhorn vs. Vanderheyden*, 1 John., 139; *Felton vs. Dickerson*, 10 Mass., 287; *Arnold vs. Lyman*, 17 Mass., 400; *Hall vs. Marston*, ib. 574; *Elwood vs. Monk*, 5 Wen., 235; *Farley vs. Cleveland*, 4 Cow., 432; *Carnegie vs. Morrison*, 2 Met., 381. The position, too is not unsustained by the English courts. *Dutton vs. Pool*, 1 Ventris, 318; which was affirmed in the Exchequer Chamber; 2 Levinz, 212; *Chit.*, 5 and 6. It would seem, however, that the doctrine is now denied in England, if the depositions of the able English Barristers used in the above cited case of *Carnegie vs. Morrison* as evidence of the law in that country may be regarded as containing a true exposition of the common law. The defendant mostly relies on a memorandum of the case of *Marchington vs. Vernon*, found in a note to the case of the *Felt Makers vs. Davis*, 1 Bos. & Pul., 101. In that case, which was assumpsit on a bill of exchange by the holder against the defendant, (assignees of the drawee) who had given a promise to the drawer that they would honor the bill. *Buller, J.* held, independently of the rule which prevails in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. This is all the report of

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that case that can be found in the books. It is referred to by Judge Story, in his work on Bills of Exchange, 544 page, who classes it with the case of Laurason vs. Mason, 3 Cranch, 492, and others of like nature, which regard such contracts in the light of a guaranty of a bill of exchange. The promise in this case cannot be so regarded, as it does not appear that the bill was discounted by the Bank on the faith of such guaranty, or that it was even known to the Bank at the time of the discount. If the defendant could recover the amount of the bill and damages at all on this promise, it is not seen how she could under the plea of set-off. Only liquidated demands can be set off. The evidence shows that the consideration of the promise in most part remains executory.— That the plaintiffs have not received it, and even if the defendant can regard the contract as rescinded, and go for the consideration, she certainly can only recover the sum that has been paid. A sum due on a guaranty cannot be set off. 1 Leigh, N. P., 154; Morley vs. Ingles, 33 Eng. Com. Law Rep., 279.

A further inquiry in this cause is, as to the necessity of the demand. It will be borne in mind, that the defendant, after the close of the plaintiffs' evidence, moved the court to instruct the jury that on that evidence the plaintiffs were not entitled to recover. This instruction was refused, and it is contended that on it the question may be raised in this Court. The necessity for a demand, must, in this case, be viewed in a two-fold aspect. First, as to a demand that will entitle them to a recovery at all; and secondly, as to the demand necessary to entitle them to the 20 per cent. per annum damages given by the 35th section of the Bank charter. Viewed in the former, which is the proper one, at the court was called upon to instruct the jury that the plaintiffs could not recover at all, the propriety of the action of the court cannot well be questioned. As the defendant claimed the money sued for as her own, as she had settled the account, and by her statement, in effect told the plaintiffs, it was not theirs; thereby showing that a demand would have been nugatory, and as the law compels no man to do a vain or nugatory act, the evidence of a demand to entitle the plaintiffs to a recovery was amply sufficient to go to the jury. It has been held that a factor's claiming a greater credit than he is entitled to, would give his principal a right of action against him without a demand. Clark vs. Moody, 17 Mass., 148.

The question as to the right to the 20 per cent. damages given by the 35th section of the charter of the Bank, arises under one of the instructions given by the court. That section enacts, "said Bank shall not at

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any time suspend or refuse payment of any of its notes, bills or obligations, nor of any money received on deposit in said Bank, when demanded by the holder or depositor at the place where the same is made payable, or when deposited in gold or silver; and in case of such refusal, the holder of such note; bill or obligation, or the person entitled to receive such money as aforesaid, shall respectively be entitled to receive interest from the time of such demand or refusal at the rate of twenty per cent. per annum until paid." The phraseology of this section is not very perspicuous. The words "or when deposited in gold and silver," would seem to imply that the penalty would only be incurred on failure to pay when the deposit is made in gold or silver. Be that as it may, can it be contended that it was designed to make the Bank pay this forfeiture in every instance of a failure to pay, and under all circumstances? The principal object of this section would seem to be to guard against insolvency and a wanton neglect to comply with her engagements. It must have been in the contemplation of the General Assembly that a bank, with the capital allowed the defendant, and being the only one in the State, would have a multiplicity of transactions with business men of all kinds, and that honest differences of opinion as to the rights of the Bank, and those with whom she dealt, would necessarily arise.—Such differences are incident to all human transactions. Was it then intended that the Bank, in every instance of litigation of its rights, notwithstanding her good faith and the reasonableness of the ground on which it was maintained, should be mulcted with a heavy penalty in the event of her not sustaining her defence? Must she, in every instance, defend what she considers an unjust demand, at the peril of paying 20, 40 or 100 per cent. damages on the amount claimed? Such a construction would be ruinous to the Bank, and would stimulate men to make unjust demands against her, trusting that the severity of the penalty would compel her to an acquiescence, and thus, a provision that was intended to secure her solvency, would be made a means of her destruction. No doubt the penalty would attach in case of a suspension or of an unreasonable refusal to comply with her obligations, but we cannot bring ourselves to the belief that when she litigates her rights in sincerity and good faith, and has a reasonable ground of defence against a demand, that she should be subject to the penalty given by the 35th section of the charter. The instruction, therefore, in relation to the 20 per cent. damages, was erroneous, and the refusal of the Bank to pay the deposit, as the 20 per cent. damages were claimed, should have been put to the jury

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with the foregoing qualifications. As a penalty was claimed, there should have been an express demand; the demand being a prerequisite necessary to be made in order to entitle the parties to it.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

## STEAMBOAT RARITAN vs. J. G. SMITH.

1. A judicial sale of a boat to satisfy a lien of any class, conveys to the purchaser a title free from the liens of every other class, superior as well as inferior.
2. A bill of exceptions concluding thus, "to which several decisions of the court, the defendant excepted at the moment," shews that the exceptions were properly taken.

## APPEAL from St. Louis Court of Common Pleas.

## CROCKETT &amp; BRIGGS, for Appellant, insist:

1st. The evidence is not sufficient to support the appellee's claim, either as to duration of services, value of his services, or the amount as ascertained by the verdict.

2nd. The sale of the boat under law process to Jonas Newman, (defending owner,) conveyed to him a clear unembarrassed title discharged of all liens, or at all events of all liens of equal and inferior class or grade.

3rd. Smith's lien, if he had any, was discharged.

4th. These liens may well be assimilated to and regarded as tacit mortgages. If so, Smith has lost his lien on the boat. 8 Johns. R., p. 333; Buford, &c. vs. Smith, 7 Mo. R., p. 489.

In Pennsylvania it has been held that where there were various liens filed, (under the act for the benefit of mechanics, &c.,) by different mechanics and others against the same house, for work and lumber, a proceeding and sale under any one of them, will release it from the whole, and the purchaser will hold the property discharged of the other liens. Anshutz vs. McClelland, 5 Watts Rep., 48; Gorgas vs. Douglass, 6 Sergeant & Rawl., p. 512; Sergeant on Lien, p. 31, 32. For the Penn. act, see Sergeant on Lien, p. 119.

If our preceding 3d and 4th positions are good, the court erred in refusing instructions asked conformity therewith.

5th. The services of Smith were rendered on foreign waters, and extr territorially so far as our laws are concerned.

1. This appears from the evidence generally, the face of the note, the place where dated, &c.

2. But if *that fact* be not clear from the evidence and shewn positively, yet the contrary does not appear. In other words, Smith has not complied with the plain requisitions of the law of Mis-

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souri by showing affirmatively (as he was bound to do,) that his services were so rendered as to locality as that the law of Missouri embraced his case, and conferred a lien on him.

The Missouri act confers partial and somewhat exclusive privileges on certain classes of men, who can only enjoy the benefit of laws constituting exceptions to the general rules and course of legislation, by positively and affirmatively shewing themselves entitled to the benefit and peculiar privilege. It is for them to show this affirmatively and beyond doubt. If this position be correct, its consequence is, that Smith never had a lien on the Raritan. Story's Conf. laws, p. 267, 268; Harrison vs. Sterry, 5 Cranch, 289, 298; Ogden vs. Sanders, 12 Wheaton, 361, 362. Act of 1838-'9, concerning boats and vessels.

**SPALDING & TIFFANY, for Appellee, insist:**

1st. The giving and refusal of instructions were not properly excepted to, and the error of the court in that respect, if any, cannot be taken notice of, on motion for a new trial.

2nd. If however the correctness of the instructions is properly before the court, then it is contended that the court did not err in giving the instruction to the jury.

3rd. The first instruction asked for defendant was properly refused, because it asks the jury to find in a certain way, if they should be of opinion that the sale of the constable was on first class claim, whereas there was no proof that they were of that class. Nor could the sale of the constable even for claims of the first class divest the lien of plaintiff, which was of the same class; at any rate under the circumstances proved, to-wit: the boat before and at the time of the sale, being in the custody of the sheriff and on this demand the constable selling with the fact known and acquiesced in by the purchaser.

4th. The second instruction of the defendant is also bad, for it assumes that the constables sold on claims of the first class. It takes that to be an established fact and so tells the jury. It also disregards the fact of this lien being levied on the boat before that sale, and the boat then being held by that levy and the sale taking place subject thereto.

5th. The only other point arising is whether the court should have granted a new trial for newly discovered evidence on Newman's affidavit. I maintain the negative.

No sufficient diligence is shown by the affidavit, to find Johnstone, or to get testimony. And the other fact stated is that the plaintiff had made some admission as to the boat, since the trial.—This evidence did not exist at the time of the trial. If the plaintiff's evidence was needed, why was not a petition for discovery used?

**SCOTT, J., delivered the opinion of the Court.**

This was a proceeding against the Steamboat Raritan, under our statute concerning boats and vessels. The claim was for services rendered as clerk by Smith, and constituted a lien of the first class. The plaintiff recovered judgment, from which the Steamboat appealed.

On the part of the plaintiff evidence was given tending to prove the length of time the plaintiff was employed, and the value of his services. On the 7th December, 1843, the Deputy Sheriff of St. Louis county, seized the boat by virtue of a warrant of that date, and continued in possession of it until the 11th of the month, when the proceeding under which the warrant issued was dismissed and the boat was seized under



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the process awarded on the complaint of the plaintiff in this case. Between the 7th and 11th of December 1843, two constables of St. Louis township attached the boat by virtue of sundry warrants, and levied on her orders of sale, under which and a great many others of a later date the boat was sold to Jonas Newman for \$1250, which sum, the constables say, satisfied all the demands of the 1st and 2nd class against the boat, and a portion of the third class. The sheriff had a hand on board of the boat when she was sold, and it was announced at the time of sale by the constable, that the sheriff held her under warrants issued on demands against her.

The court gave the following instruction: "If the jury believe from the evidence that the plaintiff is entitled to recover in this suit for wages earned on board the steamboat Raritan, within six months before the commencement of this action, then the claim of said plaintiff is to be regarded as a lien of the first class on said boat, and such lien has not been divested by the proceedings before justice Carr, and the sale by the constables, or by the proceedings of the Circuit Court and the sheriff's sale, which have been given in evidence by the defendant."

The defendant asked the following instructions: "The court instructs the jury that if they believe from the evidence, that the steamboat Raritan was seized by constables Gordon and Rule, by virtue of process issued from justices of St. Louis township, which process was founded on judgments against said boat predicated upon claims due to hands or officers of said boat, for services rendered on board thereof, that by virtue of such process, she was seized by said constables and sold to the defendant, and that such seizure by the constables was prior to the seizure by the sheriff by virtue of the process in this cause, the defendant acquired a good title to said boat discharged from the plaintiff's lien."

"That the fact that when sold by the constables as aforesaid, by virtue of first class claims, the constable also sold her to the defendant under claims of the second class is immaterial, and cannot in any manner invalidate the title acquired by the defendant by virtue of such purchase."

"If the jury find from the evidence that the Raritan was seized by writs from justice Carr, based on first class claims, and seized and reduced to possession by the constable, before the seizure was made by the sheriff at the suit of the plaintiff in this cause, such seizure by the constable vested the title to the property in him so as to enable him to sell for the benefit of the creditors for whom he was acting, and for a perfect title to the purchaser, and if after such seizure and the title becoming vested in him,

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the officers sold the whole boat, or more than was sufficient to pay said claims of the first class, the purchaser still gets a valid title and the injured party must look to the officers;" which were refused.

The bill of exceptions concludes with the following words: "To which several decisions of the court, the defendant by his counsel excepted at the moment."

The only question in this case is whether a judicial sale of a boat under the act of 1835, and the acts supplementary thereto, concerning boats and vessels, to satisfy a lien of any class will discharge all other liens on the same boat. This was a new subject of legislation to the General Assembly, and it was not to be excepted that a system without defects, could at once be framed. The laws on this subject were, until the late revision, embarrassing and present many complicated questions. Under this state of things the court feels itself called upon to look for a guide to that system from which the idea of proceeding against a vessel *in rem* had its origin, as we must suppose that the General Assembly in borrowing a remedy from the maritime law, would expect the courts to look to that law for principles of decision in questions not provided for by the statute. By the maritime law, seaman's wages were a lien on the vessel in which they were earned, which was preferred to all others. So bottomry bonds were liens, and the last bottomry bond constituted a lien preferred to those which had been previously executed. These liens could not be divested by a private sale, but a purchaser would take the vessel subject to them. If however a judicial sale was ordered and made, the purchaser under such sale took the vessel freed from all liens. It is true that in such cases, the proceeds of the sale were paid into court, and they were distributed among those entitled to them according to the priority of their rights. The steamboat *Rover vs. Stiles*, 5 Black., 483, and the authorities there cited.

Our statute gives a lien on vessels navigating the waters of this State, for debts contracted for specific purposes by those owning them. It also arranged those debts into four classes, giving to each class a priority according to its number, the highest number being the last class. If a boat is sold by virtue of law for a debt of one class, will the purchaser take it discharged of the inferior and superior class as well as those of the same class? To hold that he does not, will lead to great difficulties, and in many cases defeat the object of the law. Suppose the debts of the first and second class, exceed in amount the value of the boat, if the purchaser takes the boat subject to the lien of the inferior classes, then

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his bid will be lessened to the amount of debts of those classes, and the creditors of superior classes will thus, for the sake of the inferior classes be deprived of the means of satisfying their debts. For after they have once sold the boat, it will not be contended that they can sell her again for the same debts. The same thing may happen with regard to debts of the same class. If they who first seize a boat must sell her subject to all liens of the same class with their own, their interest in the boat may be sacrificed for the benefit of those who may thereafter attach. So, selling a boat at auction, subject to prior liens, the amount of which is unknown and when there is no means provided for ascertaining them, is a sacrifice of property destructive alike to the interests of the debtor and creditor. *Gorgas vs. Douglass*, 6 Ser. & R., 572. It should be borne in mind in considering these questions, that a proceeding *in rem* against a boat is not the only remedy a creditor is allowed by law.—He may sue those who were owners at the time the debt was contracted, or to whom the credit was given.

It would appear from the bill of exceptions that the boat was sold under a debt of the first class.

We do not think that the bill of exceptions sustains the objection that no exceptions were taken to the giving and refusing of instructions.

The other Judges concurring, the judgment will be reversed.

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THE BARGE RESORT vs. WILLIAM BROOKE.

1. A barge is a boat within the meaning of the act concerning boats and vessels.
2. It is competent evidence in a suit against a boat, on a note given by a former owner for services, to shew that the note was given and accepted as the individual note of such former owner, and for this purpose the maker of the note is a competent witness.
3. It is not necessary, in a bill of exceptions, to set out all the evidence, except where the verdict is alleged to be against evidence. If the rejection of evidence, or the refusal of instructions, be complained of, it is sufficient to shew the evidence offered, and that the evidence properly raised the question in the instruction.

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APPEAL from the St. Louis Common Pleas.

**CROCKETT & BRIGGS, for Appellant, insist:**

That the judgment below should be reversed, because the verdict and judgment were against law and the evidence;

Because R. M. Strother was not permitted to testify;

Because the instructions prayed by barge's counsel were refused; and, finally,

Because a new trial was not granted.

**B. F. THOMAS, for Appellee, insists:**

1. That the judgment in this cause ought to be affirmed, at the costs of the appellant, because the bill of exceptions does not purport to contain all the evidence given in the court below. *Foster & Foster vs. Nowlin*, 4 Mo. R., p. 18; *Hughes vs. Ellison*, 5 Mo. R., p. 110; *Vaughn vs. Montgomery*, 5 Mo. R., p. 528; *Magehan vs. Orme & Speers*, 7 Mo. R., p. 4.

2. The court below did not err in refusing to suffer R. M. Strother to testify in this cause.

3. The court below did not err in refusing to give the instructions prayed by defendant's counsel.

4. The court below did right in overruling defendant's motion for a new trial.

**SCOTT, J., delivered the opinion of the Court.**

This was a proceeding under the statute concerning "boats and vessels," against the barge, for services rendered on board said boat as watchman. Brooke, the plaintiff, recovered judgment, from which the barge has appealed to this Court.

There was evidence of the services of the plaintiff. The barge was taken to New Orleans. In June, 1844, she was attached in New Orleans for debt, and was there sold, when E. W. Clark and his brother became the purchasers. The plaintiff left New Orleans for St. Louis about the 5th July, 1844. The barge was sold in August, 1844. Strother, who built the barge and employed the plaintiff, on the 18th July, 1844, executed to him his due bill for the sum in controversy, which was given in evidence in the cause. This suit was commenced on the 9th January, 1845.

The defendant, by her owners, offered to prove by Strother, the former owner of the boat, and who executed the note used as evidence in the cause, that the said note was his own personal obligation and not binding on the boat; that it had been so received and so understood; that the

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plaintiff had no lien on the barge, and was to look to Strother individually for the money due by the note. Evidence was also given showing the kind of vessel the barge was; that she was not worked by steam, but was used by towing. The evidence of Strother was rejected by the court, as also an instruction to the effect that the barge was not subject to a lien and to this proceeding.

An objection is taken by the appellee, that the bill of exceptions does not show that all the evidence is preserved in it. It is hard to imagine a reason why the bill of exceptions should contain all the evidence in cases where the points to be raised in this Court may be the exclusion of testimony, or the giving or refusing of instructions. In such cases, all that would be necessary, it seems, would be to show enough to satisfy this Court of the relevancy of the evidence, and that the evidence raised the question of law contained in the instruction. If twenty witnesses are examined to prove one or more facts on which a point of law arises, would it not do as well to state in the bill of exceptions that testimony was given tending to establish the fact or facts, as to detail the whole evidence? In cases of this kind, to require all the evidence to be put in the bill of exceptions, is imposing great labor on the court and counsel who try the cause. It, in many cases, greatly increases the costs of suits by swelling the records unnecessarily, and is productive of nothing but embarrassment to this Court. Courts constituted like this, we find making complaints against a practice which has been adopted by this Court. *Armstrong vs. Toler*, 11 Wheat., 277; *Green vs. Collins*, 6 Iredell, 139. No inconvenience can result from a change; it will affect no man's right and greatly facilitate the despatch of business. It can only be necessary to preserve all the testimony in any case when it is brought here on the ground that the verdict is against the weight of evidence; and from the disinclination of this Court to interfere in such cases, and the many refusals of late to disturb verdicts on that ground, we suppose it would be a very flagrant case in which counsel would advise such a course.

Another question in the cause is the liability of a boat of the character of the barge to the proceedings under the act "concerning boats and vessels." The words of the act are sufficiently comprehensive to embrace vessels of the class sued in this case. The statute does not say every steamboat, or all steamboats, but *every boat or vessel* navigating the waters of this State shall be liable to attachment. The barge is clearly within the letter of the law, and there being no reason why it should not be subject to the same proceedings as a steamboat, it cannot



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be said that the General Assembly contemplated its exemption from this remedy.

We cannot see on what ground the evidence of Strother was rejected. All his interest in the barge had been conveyed away by process of law. He had made no warranty that it was freed from incumbrances. In exempting the boat, then, from the payment of the note, he was testifying against his interest, and was clearly admissible as a witness.

It may be remarked in this case, that the evidence shows that the suit against the barge was commenced more than six months after the cause of action accrued.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

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STEAMBOAT RARITAN vs. JOHN McCLOY.

A part owner of a boat, whether his right be absolute or as mortgagee, cannot acquire a lien on the boat for services rendered while he was such owner. He cannot sue the other part owners without giving the notice required by law—the proof of such notice devolves upon him, and is not to be negatived by the defendants.

ERROR to St. Louis Court of Common Pleas.

**CROCKETT & BRIGGS, for Plaintiff, insist:**

That the verdict and judgment were against the evidence.

**SPALDING & TIFFANY, for Defendant, insist:**

1. There was no sufficient affidavit for obtaining a new trial on the ground of newly discovered evidence. No sufficient diligence was shown. 6 Mo. Rep., 600; Graham on New Trials. Furthermore, this point cannot arise, as the affidavit was not incorporated in the bill of exceptions.

2. The instruction asked by the defendant ought not to have been given,

First, Because it calls on the court to say that it is incumbent on plaintiff to prove that his interest in the boat had ceased; as if that were necessary to a recovery.

Second, Because it was legal that plaintiff should recover if his interest was merely a pledge for money loaned; and testimony was given that such was his ownership, which was not objected to.

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*Steamboat Raritan vs. John McCloy.*

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3. The instruction given by the court was correct. It assumes as the law, that if the plaintiff was interested merely as mortgagee, or what is in substance the same, was invested with the legal title of an interest in the boat merely to secure to him the payment of money by him loaned to the boat, he might nevertheless sue the boat for wages, which proposition is a correct one.

And the act of Feb. 29, 1839, page 13, section 4, does not conflict with this position. It speaks of *joint owners*, who are really such *quasi partners*, and not of those who have an interest by way of mortgage or lien to secure a debt. A mortgagee would certainly not be precluded from suing the boat, if he happened to earn wages on her while he was mortgagee; nor would a person to whom a deed of trust were made. The estoppel is not in the way.

4. Again, the act of assembly does not prevent the former joint owner from suing. It enacts that a "*joint owner*" may sue on giving notice to the joint owners of his intention so to do. But the plaintiff was not joint owner at the time the suit was brought, and had not been for a month; and even if he had been, the statute does not prohibit him from suing, and if he had not given the notice, that fact should have been set up by way of defence.

5. The verdict was not against evidence in such a sense as to require the interference of the court, even supposing a former joint owner could not sue the boat for his demand accrued during the time he was part owner. Plaintiff was captain and clerk long enough to authorize the verdict, and the estoppel does not prevent plaintiff from showing for what purpose and how he was owner. If he was owner for the purpose of securing a debt of \$500 due to himself, and for that object only, his deed given in evidence does not estop him from saying this.

6. The question whether the boat is liable for a claim accruing beyond the limits of the State of Missouri, does not arise in this case. As it was not made nor passed upon in the court below, this court cannot notice it.

*Scott, J., delivered the opinion of the Court.*

McCloy instituted proceedings under the statute concerning boats and vessels against the steamboat Raritan for services as captain of the said boat. At the February term, 1845, judgment was recovered for \$376 25.

It appears that the steamboat Raritan, was in custody of the law at Cincinnati for debt, when McCloy made advances for her relief. It does not appear whether he purchased the boat or whether he took a mortgage upon it, or in what manner he secured his advances. A witness testified that he was told by Capt. Sheble, who was a captain on board of the boat, and Sam. Marks, that the plaintiff had advanced money to get the boat out of difficulty, and was to hold her until he was repaid; but that the boat was still theirs. Sheble said he was the owner of the said boat, and Marks said the same, but that for some reason she stood in Marks' name. This took place about the 7th November, 1843. On the 7th November, 1843, McCloy executed a bill of sale for the steamer Raritan. This instrument recites that he sold seven-eighths of the hull of the boat to S. T. Marks; that on 8th September, 1843, he had enrolled her as owner of seven-eighths, at Cincinnati, Ohio. There was also an agreement between McCloy and Thomas W. Pollard, dated 11th September,

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*Steamboat Lebanon vs. John Grevison.*

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1843, by which McCloy engaged the services of Pollard as clerk of the Raritan, in which it is recited that McCloy is master and owner. The plaintiff, McCloy, commenced services as captain about the 1st September, 1843.

The court was asked to instruct the jury, in substance, that if they believed from the evidence that the plaintiff was owner, or part owner, of the boat, he could not recover.

The court instructed the jury that if they believe from the evidence that the plaintiff was owner or part owner of the Raritan during the time or any portion of the time for which he claims to be paid for services on said boat, he is not entitled to recover for such services, unless the jury believe from the evidence that such title was in the plaintiff as mortgagee for the purpose of securing the payment of money advanced by him for the boat.

It does seem that a bare statement of this case is sufficient for its determination. That an individual should hold himself out as the owner of a boat, sell it to another, and, after it has passed into the hands of a third person, should be permitted to attach that boat for services which he rendered whilst he himself was the owner, is very strange! Suppose he was only a mortgagee, of which there is no evidence, yet being a mortgagee in possession, and rendering services on the boat, so that she might earn the means of paying his debt, on no principle could those services become a lien on the boat, as they were rendered for himself. He being the owner for the time, he could not contract with himself. If McCloy was a part owner, he had no right to proceed against the boat without giving notice to his part owner. The right existing by statute, it could only accrue by a compliance with its terms, which only give it after twenty days notice. It was not necessary on the part of the boat to show that notice had not been given. It was the duty of the plaintiff to show it affirmatively.

The other Judges concurring, the judgment will be reversed.

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STEAMBOAT LEBANON vs. JOHN GREVISON.

A note given for money loaned to a person to enable him to purchase a boat is no lien on the boat.

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*Steamboat Lebanon vs. John Greivson.*

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### ERROR to St. Louis Circuit Court.

**CARROLL & GIBSON, for Plaintiff in error.**

1st. This is an effort to hold the boat responsible under our statute for money loaned to purchase a boat. The boat was not on any trip or voyage; she was not under weigh; she was not proposing to start on any voyage; she was empty at the wharf. But more than this, the boat was in *custodia legis*, actually in an officer's hands at the time this money was loaned. If money thus loaned be "supplies," and a lien in the meaning of the law, and the courts, all language is confounded and all our ideas of a lien are reversed.

2nd. H. Powers was not the owner or master of the steamboat Lebanon at the time the money was borrowed, for which the note in this case was given; the boat was in the hands of an officer of the law, and all the rights of the owner in her was sold at public auction, and this money was borrowed to pay for her. How, at such a moment, and under such circumstances, can a boat have a master? What are his duties in such a case?

3rd. The statute gives the lien if there be any, and what part of the statute sets forth the loan of money to purchase a boat as a lien? There is none.

4th. The Judge of the Court of Common Pleas, in the instructions he gave to the jury, left the jury to determine what was, and what was not a lien, which is a pure question of law, with which a jury has properly nothing more to do, than they have to do with our title to Oregon.

5th. The instructions asked for on the part of the defendant, are undeniable law, reason, sense and justice, and ought to have been given.

6th. Liens are not transferrable. If A has a judgment against B, and B's property is sold to satisfy the debt, the purchaser acquires all the rights of both A and B in the land, and if the purchaser borrows money wherewith to pay the sheriff, and thus gets a deed, did any body before in the world ever suppose that the man who thus loaned the money to him, acquired any lien whatever? No; the honor of that discovery has been reserved for the modern luminaries in jurisprudence—the *latter-day saints* of the law.

**FIELD, for Defendant in error.**

**SCOTT, J., delivered the opinion of the Court.**

This was a proceeding against the steamboat Lebanon, under the statute concerning boats and vessels. On the trial, Greivson the plaintiff below, obtained judgment; the cause was then taken from the Common Pleas to the Circuit Court by writ of error, where that judgment was affirmed. The cause is now brought here by writ of error.

It appears that in April 1845, the boat was attached for debts, and continued in possession of the officer until the 3d May, 1845, when she was sold. The note evidencing the debt for the recovery which this proceeding was instituted, bore date the 3d May, 1845, and there was evidence showing that the money claimed in this suit was loaned to Captain Pow-

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ers to enable him to pay for the boat of which he became the purchaser. Powers had been and was master of the boat at the time she was attached. There was evidence that previous to the 3d May, the boat was not indebted to the plaintiff.

The court instructed the jury, that if the money borrowed by Henry Powers was applied to the satisfaction of liens on the steamboat Lebanon, and was borrowed for that purpose, the plaintiff is entitled to recover; and refused instructions to the effect, that if the money loaned by the plaintiff to Powers the purchaser, was for the purpose of enabling him to pay for the same, they will find for the defendant.

Even admitting that the first instruction contained a correct legal proposition, about which no opinion is given, we do not see that there was any evidence to warrant it. The instruction asked by the defendant fairly met the facts of the case, was in conformity to law and should have been given. The other Judges concurring, the judgment will be reversed and the cause remanded.

## ROBBINS vs. AYRES.

1. If A covenant [with B, for the benefit of C, suit cannot be brought on the covenant in the name of C, but only in the name of B, to the use of C.
2. But if A, make to B, for a valuable consideration, a promise not under seal, for the benefit of C, C may maintain an action in his own name on such promise. The promise need not be in writing and is not within the statute of frauds.
3. If A make to B, such a promise for the joint benefit of several, suit must be brought in the name of all. If however the interest of each beneficially interested, be specified in the promise, then each may separately maintain his action.
4. A covenant merges all prior simple contracts, and a simple contract afterwards made, is inoperative.

## APPEAL from St. Louis Circuit Court.

PRIMM & WHITTELSEY, for Appellant, insist:

1. That a stranger to the consideration can maintain no action, and if this be good law, the



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court erred in refusing the defendant's instructions. See *Price vs. Easton*, 4 Barn. & Ald., 433; affirming the case of *Crow vs. Rogers*, 1 Strange, 592; *Bent vs. Brainerd*, 1 Mo. R., 285; *Thornton vs. Smith, et al.*, 7 Mo. R., 89; *Chauvin vs. Labarge*, 1 Mo., 556; *Wain vs. Walters*, 5 East. R., 10; 2 Smith's L. C., 147; Law Library, 21, 107.

A similar rule applies to deeds, that none but parties to a deed can sue upon it, and then the instruction was erroneously refused. *Southampton, et al. vs. Brown*, 6 Barn. & Cress., 618.

2. The next point made is, that unless Robbins did agree *in writing*, the promise under the statute of frauds, would be void. See Rev. Code, Mo., 1835, p. 117; Code 1845, ch. 68, p. 530; *Birkney vs. Darnell*, Salkeld 7; 1st Smith's L. cases, 134 & notes. And if this agreement was made in the form of a covenant by Robbins with Dickinson, then the plaintiff, if he had any interest in the deed, should have sued on the same, making himself a party thereto by proper averments, and he cannot use the writing merely as evidence on the general issue in an action of assumpsit, for the defendant Robbins having elected in what form and manner he would become liable for the debts of Dickinson, the defendant cannot vary the liability, and therefore the instruction was erroneously refused. *Wain vs. Walters*.

3. If the agreement between Dickinson & Robbins (which, if the defendant used, to prove the defendant's liability,) was under seal, then assumpsit will not lie, and the court sitting as a jury, should have found for the defendant. See 1 Chit. Pl., 117, n. t. & n. 256; *Lawton vs. Erwin*, 9 Wend. R., 233; *People vs. Holmes*, 5 Wend., 191; *Richards vs. Killam*, 10 Mass., 243, 247; *Anderson vs. Montgomery*, 19 J. R., 162; *Codman vs. Jenkins*, 14 Mass., 93.

4. If the promise is by deed, the suit must be debt or covenant. 1 Chit. Pl., 117, n. t. n., 256; 9 Wend., 338; 5 Wend., 191. And a special action of assumpsit cannot be maintained, much less one on the common counts. See express decision of Mass. courts, per C. J. Sewall, 10 Mass. R., 247; *Richards vs. Killam*.

5. The suit therefore should have been on the deed, in the name of Dickinson, to use of Ayres, or covenant in the name of Ayres. *Lawton vs. Erwin*, 9 Wend., 338; *People vs. Holmes*, 5 Wend., 191; *Richards vs. Killam*, 10 Mass., 244, 247.

6. The promise of Robbins was to pay the hands \$600, it was therefore a joint promise to pay all jointly, and one cannot sever and sue alone. And the court should therefore have found for the defendant. And a promise to pay jointly must be sued on by all. 1 Chit. Pl., m. y. & n. 14; *Baker vs. Jewell*, 6 Mass. R., 462; *Montague vs. Smith*, 13 Mass. R., 405; *Wells vs. Gaty, et al.*, 9 Mo. R., 565.

*EAGER & HILL, for Appellee, insist:*

1. That the plaintiff Ayres had a lien on the Diving Bell boat for his wages as a hand, and the defendant having bought the said boat of Dickinson, in consideration of the premises, promised to pay the plaintiff for his wages on said boat.

2. The promise to pay the plaintiff his wages, was founded on a good consideration moving between the parties to this suit at the time, and therefore is not within the statute of frauds.

3. The consideration is original and cannot be held to be collateral.

4. The plaintiff hath foregone his lien, and has relied on the defendant's promise, he has therefore lost his security against the boat.

5. As to all the work done by the plaintiff on the Diving Bell boat, after the sale in December, 1842, up to the middle of February, 1843, the defendant being then owner, the judgment is valid for so much as those services were worth.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of assumpsit on the common counts, and a special

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count; plea, non-assumpsit; verdict and judgment for Ayres, plaintiff below.

It appears that H. B. Dickinson was the owner of a diving bell boat, used in taking up the cargoes of steamboats that had been sunk. The boat was employed in the Mississippi. While employed, Dickinson sold out to the appellant, defendant below. An instrument of writing under seal, was executed between Dickinson & Robbins, by which Dickinson sold the boat to Robbins, and Robbins stipulated to pay the hands employed on the boat the sum of six hundred dollars, for services they had rendered. This instrument was read to the hands and they accepted its terms. There was also evidence that Robbins at the time declared that he would pay the hands the sum of \$600, or that he said he would see them paid that sum. After the sale the boat was taken to Memphis, and whilst there, Dickinson drew an order on Robbins in favor of the plaintiff below, which was protested. It appears from the evidence that the instrument of writing between Dickinson & Robbins, was left with Robbins.

The special count in the declaration, was on the parol promise of Robbins to Dickinson, that he would pay the hands the sum of six hundred dollars.

The trial of the cause was submitted to the court sitting as a jury, and the court was asked to declare the law to be as is stated in the following instructions on the part of the defendant, which were given, viz:

"If the jury believe from the evidence, that an agreement under seal was made between Dickinson & Robbins, for the payment of six hundred dollars to the hands, and not to each, his proportion, then all the hands have a joint interest, and they cannot sever and sue alone."

"If the jury believe from the evidence, that the defendant's agreement was to pay the hands jointly, six hundred dollars, the defendant cannot sue alone."

"If the jury believe from the evidence, that the defendant's promise, was to pay the plaintiff jointly, with several others who are not joined in suit, then the plaintiff cannot recover."

"If the jury believe from the evidence, that the original indebtedness for the work and labor of the plaintiff, was by Dickinson to plaintiff, that then the promise of the defendant is void under the statute of frauds, and unless the same was in writing and signed by the defendant or his agent thereto lawfully authorized, or unless there was there some new consideration of benefit passed from said Dickinson to the defendant."

And refused the following instructions, asked by the defendant, viz:

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"If the jury believe from the evidence, that no consideration passed from the plaintiff to the defendant, for his promise by deed to Dickinson to pay the hands six hundred dollars, then the plaintiff is a stranger to the consideration and cannot recover in this action."

"If the jury believe from the evidence, that the agreement between Dickinson & Robbins was under seal, then the plaintiff cannot recover in this form of action."

"If the jury believe from the evidence, that the defendant was a trustee, for certain purposes in the deed spoken of by the witnesses, and especially to reserve and pay the hands six hundred dollars, then the plaintiff cannot recover in this action."

"If the jury believe from the evidence, that the instrument of writing, executed by Dickinson and the defendant, upon which the plaintiff claims to recover, in this action, was a sealed instrument, the jury must find for the defendant."

"If the jury believe from the evidence, that an agreement under seal was made between Dickinson & Robbins, that six hundred dollars should be reserved from the proceeds of wrecks and other property for the payment of the hands, then the plaintiff cannot recover in this form of action."

"If the jury believe from the evidence, that the plaintiff was a stranger to the consideration of the deed between Dickinson & Robbins, then the plaintiff cannot recover in this action."

"The diving bell boats, are not boats used in navigating the waters of this State, and for work and labor done and performed upon said boats, the plaintiff could, under the statutes of this State, have no lien, and the relinquishment of any supposed lien, when no lien legally existed, could not form a legal and valuable consideration for the defendant's promise to the plaintiff, as alleged in the plaintiff's declaration, either under the special or common counts."

"If the jury believe from the evidence, that the consideration of the defendant's promise to the plaintiff was the sale of property by Dickinson to defendant, then the plaintiff cannot recover in this action."

Exceptions were taken to the refusal to give these instructions.

If the liability of Robbins was evidenced by an instrument under seal, he could not be sued but by him with whom he covenanted. If he agreed with Dickinson to pay the hands on the boat the sum of \$600, the hands cannot maintain an action on the covenant. Chitty, 3. If however, there was a simple contract, for a valuable consideration made with Dickinson to pay the hands, those hands might maintain an action upon

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it. There is, in such case, no necessity of a consideration moving from the hands. *Bank of Missouri vs. Benoist & Hackney*, decided at this term of the court. The statute of frauds, has nothing to do with such a contract; it is not within its terms or meaning, and therefore need not be in writing to be valid. *Barker vs. Bucklin*, 2 Denio, 45. The hands by suitable averments may show, that they were the individuals intended by the promise. *Fellows vs. Gilman*, 4 Wend., 414.

We do not perceive the principle on which the hands named in the contract can sue separately, admitting they had a right of action. It does not appear that the money agreed to be paid them, was to be equally divided, nor even does the number of hands appear. If each hand was permitted to bring a separate action, the defendant might be compelled to pay more than he promised. One plaintiff may recover a sum; the sum thus recovered, will be no evidence on a suit by another hand, that he was entitled to the amount. A portion of the hands may recover the whole sum promised; would the other hands be thereby precluded from recovering the sums to which they were respectively entitled? This is not like the case of *Whorewood vs. Shaw*, Yel., 26, in which it was held that a bill of debt, in which C acknowledged that he had received forty pounds, to the use of A & B, equally to be divided, creates a debt of £20 to each, on which each may sue. Nor does it come within the principle, that when the interest of two or more covenantees is several, though the covenant be joint, each of them may bring an action for his particular damages. But it rather falls within the principle of the case stated by Chitty, 10, where A & B, brought an action of assumpsit and declared, that their several cattle had been distrained, and that the defendant in consideration of ten pounds paid him by the plaintiff, promised to procure a re-delivery of the cattle; it was objected that the action should have been several, but it was held that the action was well brought jointly by A & B, as the contract and consideration were joint, and it was not known *how much one gave, and how much the other*.

If there was a covenant by Robbins with Dickinson, to pay the hands the sum of six hundred dollars, that covenant would merge all simple contracts, and a simple promise to pay that sum afterwards would be inoperative. If there was a covenant, with Dickinson to pay the hands, suit may be brought in the name of Dickinson for the benefit of the hands.

The other Judges concurring, the judgment will be reversed.

*Nat (of color) vs. G. W. Coons.*

NAT (OF COLOR) vs. G. W. COONS.

1. A will made in another State, by a person then a resident of such State, but who afterwards removes to this State, and dies a resident of this State, is invalid, if not made according to the laws of this State.
2. Such a will, if made according to the laws of this State, need not be republished in this State, upon the removal of the maker to this State.
3. A copy of the probate of such a will, made in the courts of another State, is of no effect in this State.

APPEAL from St. Louis Circuit Court.

TOWNSEND, for Appellant, insists :

1. The judgment is erroneous, because a *material issue* joined between the parties was not found by the jury. See Fenwick vs. Logan, 1 Mo. R., 401; Easton vs. Collier, 1 do., 421; Jones & Jones vs. Snedecor, 3 do., 390; Foster & Foster vs. Nowlin, 4 do., 18; Pratt vs. Rodgers, 5 do., 51.

2. The plaintiff showed a right to his freedom as against the defendant, because,

First, Both of the copies of the will offered in evidence by the plaintiff were competent evidence. The first, which was a copy of the *record of the will*, as recorded in the office of the Probate Court of St. Louis county, was competent evidence under the statutes of this State. See Rev. Stat. of 1845, title Wills, sec. 28, 29, 35 and 36.

The second, which was a copy from the office of the Probate Court of Warren county, State of Mississippi, was competent evidence under the laws of the United States, agreeably to which it was authenticated as a *judicial proceeding* of a court of record of the State of Mississippi, and likewise competent evidence under the laws of this State. See Rev. Stat. of 1845, title Wills, s. 28, 29, 35 and 36, and the act of Congress; also, Bright, *et al.* vs. White, 8 Mo. R., 422.

The extracts from the laws of Mississippi preserved in the bill of exceptions and offered in evidence on the trial, show that the probate was duly made before the proper court, and that the original will could not be had.

Second. The validity and effect of the will is to be decided upon by the laws of the State of Missouri, where the testator was residing at the time of his death, and where his negroes, as well as other property, were locally situate, and not by the laws of Mississippi. See Story's Conf. L. pages 62, 63, 64, 65, 66, 67, 312, 314, 391, 394, 398, 403. The case in 7 Louisiana Rep., 135, (Wheeler, 311) cited by Mr. Spalding, does not contradict these authorities, inasmuch as it appears from that case that the testator died in the State of Georgia, and was domiciliated there at the time of his death.

3. According to the laws of this State, the will effected a full and perfect emancipation. See Rev. Stat. of 1835, title Slaves, art. 2, sec. 1, 2, 3, 6.

4. The will is not merely directory, but *ipso facto*, works an immediate emancipation upon the testator's death. See 1 Gill & Johns., 390.

5. The evidence offered by the defendant, therefore, was entirely irrelevant, as it showed no authority for the defendant's holding the plaintiff in slavery, nor any justification or excuse thereof.

6. The defendant stands in the shoes of his testator, and even were the emancipation void as to



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the creditors of the testator, the defendant is not in a situation to avoid it, but deriving his authority from the will, is bound by it, and cannot hold the plaintiff in slavery, contrary to its provisions.

7. The law has taken care of the rights of creditors by providing that slaves emancipated by any deed or will shall be liable to be taken in execution to satisfy any debt contracted by the person emancipating them prior to the act of emancipation. Rev. Stat. of 1835, title Slaves, art. 2, sec. 3.

8. But if the plaintiff's right to his freedom depends upon the sufficiency of the assets of the testator, exclusive of his slaves, to pay his debts, and in default of such assets, the defendant had a right to hold said slaves in slavery, then surely the evidence offered by the plaintiff to show that no such deficiency of assets existed, was entirely competent and ought to have been received.

9. If there was no original deficiency of assets, surely the defendant ought not to be permitted to take advantage of his own wrong, by alleging, as an excuse for holding the plaintiff in slavery, a deficiency of assets, which he himself had produced by his waste and misconduct.

10. But surely it was competent for the plaintiff to show that some of the demands originally established against the estate had been subsequently disallowed, and were not, at the time of the trial, debts against the estate.

11. The evidence given upon the trial showed an amount of assets in the hands of the administrator far exceeding the debts remaining unpaid, none of which assets were shown to be unavailable.

#### SPALDING, for Appellee, insists:

1. The first error assigned cannot be sustained. It is upon the finding of the jury that the "*defendant is not guilty of said several grievances, or either of them, in manner and form,*" &c.; and nothing is said of the second issue on the plea that the plaintiff was not a free person at the commencement of this suit.

First. The record shows that only one issue was submitted to the jury, and on that one they found. The act of submitting the issues was the act of the parties; if they chose to drop the second issue and go to the jury on one only, they ought not to be permitted afterwards to object; where all the issues are submitted, and the jury fail to respond, it is different.

Second. The court below never passed upon the point, and therefore this Court cannot take notice of it. 1 Mo. Rep., 283, 350, are cases where motion in arrest was made, but none was made here. The cases where the Court has reversed, are cases of several material issues, *all submitted to the jury*, and the jury failed to find as to some of them. 9 Mo. Rep., 632; but it must be otherwise where the jury were not sworn on all the issues.

Third. But the issue found embraced the whole case; and if the jury had found for plaintiff on the second issues, the judgment must have been given for the *defendant*. See Rev. Code of 1835, title Freedom; 1 Mo. Rep., 115, *Tate vs. Barcroft*; 1 Mo. Rep., 419, *Wear vs. McCorkle*.—Where judgment is for the right party on the whole record, Court will not reverse. 1 Mo. Rep., 534, *Wathan, et al. vs. English*; 9 Mo. Rep., 632; 1 Mo. Rep., 223. 5 Mo. Rep., 51, 477.

2. The will of Milton Duty does not free the slaves, but only provides they shall be manumitted on the happening of a certain event, and they were never manumitted.

3. But even if the will does emancipate them, yet the emancipation was conditional and contingent, and was to take effect only after the payment of all the testator's debts, for this is the express provision of the will. 2 Har. & Gill, 1; (*Wheeler on Slavery*, 327; 2 Leigh's Rep., 189; (*Wheeler*, p. 315.)

4. At the time the suit was brought, and even at the time of trial, the debts were not all paid. Only 51 per cent. had been paid on the debts in the 6th class, and nothing on the debts in the 7th class, and nothing on the debt of Strong, which was pending on appeal in the Circuit Court.

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5. The testimony offered and rejected, that there were assets enough and money enough in the administrator's hands to pay the debts, and that the administrator had committed waste, &c., was irrelevant, as the freedom depended by the will on the *actual payment of the debts*, and not on the fact that there were sufficient assets to pay them. Those assets may be all squandered, and the securities of the administrator be insolvent. In truth, it is not known even to this day but that Nat will have to be sold to pay the debts. Yet, by the will, he was not to be free *'till the debts should be paid*. The record shows that the *plaintiff* admitted the debts were not paid, and also gave in evidence the latest settlements with the Court of Probate made after this suit was brought, which showed debts still unpaid.

6. But the will being made in Mississippi, with reference to the laws of emancipation of that State, and admitted to probate in that State, must be considered as controlled by the laws of Mississippi; and when an exemplification is brought here, it will operate as if in Mississippi, and if it does not set free the slaves there, it does not do it here. 7 Louisiana Rep., 135; (Wheeler, 311.)

7. The will is not so executed and authenticated as to effect the emancipation of Nat. Rev. Code of 1835, page 619, secs. 19 & 20; Rev. Code 1835, page 587, secs. 1, 2, 3, 4, 5, 6, 7, 8.

8. The exclusion of the copy of the record of the will taken from the office of Probate in Missouri, is the second error assigned; but the act of the court was right, because it was *the copy of a copy of a copy*, and also *because the copy of the will was immediately offered and received in evidence*, as exemplified from Mississippi. The plaintiff, therefore, having given the copy of the will in evidence, cannot complain that *a copy of a copy of that copy* was rejected; besides, no objection was specified. 8 Mo. Rep., 128.

9. The admission of the copy of the letters of administration, with the will annexed, was not erroneous. That was the authority of the defendant to hold the slaves. He was sued as trespassing on the rights of Nat, and an emancipation by Duty's will alleged as the title of Nat. His defence was to show an administration pending and debts unpaid, and the production of the letters was his first document in order.

10. That a copy of abstract of demands allowed and of settlements made, was admitted, is the 4th error assigned, but this was surely evidence relevant to prove debts unpaid, and it was competent, being copies of records required by statute to be kept. Rev. Code, page 94, sec. 21, and page 96, sec. 1. But whether competent or not, this Court will not enquire, as the objection was general and specified no reason. 8 Mo. R., 128.

SCOTT, J., *delivered the opinion of the Court.*

Duty, the late master of Nat, executed a will in the year 1836, in the State of Mississippi, of which he was then a resident. By this will, Nat, with other slaves, were liberated after the payment of all the debts. Afterwards, in the year 1837, Duty, with his slaves, removed to the State of Missouri, where he resided until his death, in 1838. This will was admitted to probate in Warren county, in the State of Mississippi, and upon a production of that probate to the Clerk of the Probate Court in St. Louis county, the same was recorded, and thereupon letters testamentary, with the will annexed, on the estate of Duty, were committed to G. W. Coons, the appellee and defendant below. Nat contending that the debts of the estate were paid, or that there was a sufficiency of assets to satisfy them without selling the slaves, under leave, instituted a

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suit for his freedom in which judgment was rendered against him, from which he appealed to this Court.

It is a principle recognized in the American law, that a will, in order to be valid, must be executed according to the law of the testator's domicile at the time of his death. 1 Bin., 336; Story's Conflict, 394. It is not denied but that Duty, at the time of his decease, was domiciliated in this State. His will, then, must have been executed according to our law. Having made a will in Mississippi, which was in conformity to the laws of that State, if its mode of execution so far conformed to our law as to render it valid as if executed here, his subsequent removal to this State would not invalidate it, although there was no republication in this State. In such case, the will would be considered as having been executed here, and would be proceeded on accordingly. It would be regarded as a will made in Missouri. A statute in force at the date of this will authorized citizens of the United States or of the Territories thereof, to dispose of their property in this State, whether real or personal, according to the law of the State of their domicile or of this State. The will of Duty does not come within this provision. He, at the time of his death, was a citizen of this State, and the law was only intended for citizens of other States owning property in this State. If a citizen of another State make his will according to the law of that State, and should afterwards remove to this State, if the will made in the other State should not be executed according to the requisitions of our law, it could not be set up in our courts as his will.

An application of these principles will determine this cause. Without undertaking to say what effect the removal of Duty from Mississippi might have had on his will in that State, and admitting that it was so executed under the Mississippi law as to be as valid as if executed here, and that there was such a conformity in the modes of execution required by the laws of the two States, that a will executed under one law might be valid under the other, yet this was a Missouri will, and the original should have been proved in this State. No foreign copy was properly admitted in evidence, nor could a foreign probate confer any rights. If it was used as a will under the laws of Mississippi, it is clear that it could not confer freedom, as it appeared by the laws in force then that the assent of the General Assembly was necessary to an act of emancipation.

The case, then, falls within the principle that if, upon the whole, it appears that a judgment has been rendered for the right party in the court below, although there may have been error, it will not be reversed.

The other Judges concurring, the judgment will be affirmed.

*Ricketson & Holt vs. J. & T. Wood & Co.*

## RICKETSON &amp; HOLT vs. J. &amp; T. WOOD &amp; CO.

1. The assignee of a note not negotiable can only recover of his assignor so much of the note as cannot, by due diligence, be made out of the maker.
2. A maker of such a note, who has the means of paying a sufficient portion of the debt to make it worth a suit, is not so insolvent as to entitle the assignee to recover of the assignor without suit.

## ERROR to St. Louis Court of Common Pleas.

## GAMBLE &amp; BATES, for Plaintiffs, insist:

1. The language of the statute is explicit that the assignor is not liable by reason of the insolvency of the maker, unless he be *so insolvent that a suit against him would be unavailing*. R. C. of '25. And surely a suit would not be unavailing, if a half, or a fourth, or a tenth part of the debt could be recovered. The Common Pleas Court thinks it would be unavailing unless the maker had property enough to pay *all his debts*. This Court, however, has expressed a different opinion. The suit would not be unavailing if the plaintiff could thereby make the money due or *any part of it*. *Pococke vs. Blount*, 6 Mo. R., 338—especially p. 345; and see *Pillard & Dants*, adm. 6 Mo. R., 58, full to the point. In 4 Pet. R., 366, *Bank U. S. vs. Tyler*, it is determined that the assignor is not liable until the assignee has diligently pursued all means of payment as against the maker. And to the same general purpose, see 2 Pet. R., 331, *Bank U. S. vs. Weiseger*, and a collection of cases in a note appended; and 3 A. K. Marshall, 59.

We suppose that the true meaning of the statute is, that the assignor is liable for whatever portion of money due on the note which the assignee cannot make by diligently pursuing the maker and his property in our own courts, and for nothing more.

It is also submitted that the court below erred in refusing to grant a new trial, because,

First, The court gave wrong instructions, and refused to give right ones, as above stated.

Second, Notwithstanding the wrong instructions of the court, the jury ought to have found the mixed question of law and fact—the insolvency—for the defendant. That it is a mixed question, see *Pococke vs. Blount*, *supra*. And the testimony would well warrant such finding.

3. Upon the facts of the case, and under one instruction given by the court, the jury ought to have found for the defendants, on the ground of the fraudulent conveyances made by Walker to Merry and to Payne.

## POLK, for Defendants, insists:

1. The 1st and 4th instructions given on the prayer of the plaintiffs, and the 1st and 2nd instructions prayed by defendants and refused—particularly the second—raise the question whether, to entitle the endorsee of a note not negotiable to recover against the endorser, on the ground of the insolvency of the maker, that insolvency must be such as that *no part* of the debt could be made by suit, or only such that the whole of the debt could not be made.

The court below proceeded upon the principle that in order to a recovery by the endorsee against the endorser of a note not negotiable, it is not necessary to prove that no part of the debt could be made out of the maker by suit.

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*Ricketson & Holt vs. J. & T. Wood & Co.*

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I maintain that the principle adopted by the Court of Common Pleas is the true one applicable to the case.

2. In the instructions which the court below gave upon the question of the insolvency of Walker, the maker of the note, as for instance in the first instruction, it used the very language of the statute, when it said, "so that the institution of a suit against him would be unavailing." And in cases like the one at bar, it is obviously right and better, where an instruction is given with reference to the provisions of a particular statute, that the court should adopt and use the very language of the statute.

And so this court has ruled expressly in the case of *Jacobs vs. McDonald*, 8 Mo. R., 565, and that, too, upon this very statute.

3. The first instruction refused by the Common Pleas Court, upon the prayer of the defendant, was rightly refused; or in other words, that court committed no error prejudicial to defendants in refusing it.

First. It is the same in effect and purport as the first instruction given by the court on the prayer of the plaintiffs.

It was therefore no error to refuse it for that reason alone. *Williams vs. VanMeter*, 8 Mo. R., 339.

Second. It asks the court not only to say that Walker must have been insolvent at the time of the maturity of the note, in order to a recovery against the endorser, but also that such insolvency must have continued down to the commencement of the suit.

But it is clear, from the very language of the statute itself, that it was enough that Walker was insolvent at the maturity of the note. See statute.

4. The court committed no error in refusing the 2nd of the instructions it refused, that the defendants had asked.

This instruction *does not fix any time* at which it must have been shown that Walker was insolvent.

Under this instruction, if the court had been so unwise as to have given it, the plaintiffs' action would have been lost before the jury, if they had believed Walker solvent at any moment of time from the maturity of the note down to the very day of trial.

5. As to the third of defendants instructions refused, this instruction also was rightly refused.

First. According to this instruction, if the jury should find from the evidence that the transfers of property from Walker to Merry & Payne were fraudulent, they would be obliged to find for the defendants—even though they should find, that after said transfers had been made, Walker still had four or ten times as much property as would have paid all his debts.

Second. Again, the effect of fraud in the transfers of property from W. to Merry & Payne, is made as potential in the 3rd instruction given by the court already, at the prayer of the plaintiffs, as the defendants claim it shall be by this instruction. There is, therefore, no ground of exception in that respect.

But the third instruction, which the court had already given, differs from this, in that it requires that the property fraudulently transferred should have been sufficient, if it had been used for that purpose, to pay the just debts of Walker. And this, I contend, was a qualification of the instruction, which was legally proper and necessary.

6. To show that the instruction given by the *Nisi Prius* Court, upon the effect of the receipt given by Stratton, the agent of the plaintiffs, is unexceptionable, I need only refer to the very terms of the receipt as set out in the bill of exceptions.

7. I further contend that the Court of Common Pleas ought to have given the instruction prayed by the plaintiffs, which appears upon the record as the first one of the instructions refused by the court, that had been prayed by plaintiffs.



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*Ricketson & Holt vs. J. & T. Wood & Co.*

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NAPTON, J., *delivered the opinion of the Court.*

This was an action of assumpsit, brought upon a promissory note made by William Walker, payable to the order of Ricketson & Holt, and assigned by them to the plaintiffs, J. & T. Wood & Co. The declaration consisted of two counts, one of which averred that Walker was so insolvent that a suit against him would be unavailing, and the other that he was a non-resident of the State. Plea, non-assumpsit. The plaintiff obtained a verdict and judgment.

Upon the trial, it appeared that a suit had been instituted by attachment against Walker, the maker of the note, which was litigated for several years, and was finally terminated by quashing the writ, in consequence of some informality.

The evidence was chiefly directed to prove Walker's insolvency, from the time the note matured up to the commencement of the present action.

Upon this subject, the court gave the following instructions, at the request of the plaintiffs:

"If the jury believe that William Walker executed the note mentioned in the declaration, to the defendants, and that defendants assigned it to the plaintiffs, and that on the 24th August, 1837, William Walker was insolvent, and so continued up to the commencement of this suit, so that the institution of a suit against him would have been unavailing, they must find for the plaintiffs."

"If the jury find that the said note was made and assigned as aforesaid, and that before the same became due said Walker had put all his real and personal property out of his hands, or had conveyed in good faith to other creditors all of his real and personal estate, so that he had no real or personal estate when said note matured, out of which the said debt could have been made, the plaintiffs were not obliged to bring a suit against the said Walker; such circumstances would justify the plaintiffs in regarding him as insolvent."

"If the jury believe from the evidence that the assignment of property by Walker to Merry & Payne, spoken of in the testimony, were fraudulent, and that if the property so transferred had been used to pay the just debts of the said Walker, that there would have been means sufficient to pay those debts, they will find for the defendants."

"It was not necessary that a suit against Walker should have been proceeded in to judgment, and the execution thereon returned unsatisfied, for want of property to levy it upon, before the plaintiffs could sue

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*Ricketson & Holt vs. J. & T. Wood & Co.*

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the defendants in this case, if the jury believe from the evidence that Walker had not sufficient property to pay his debts, after the note sued on in this case became due."

The court refused to give the following instructions, asked by the plaintiffs:

"If the jury believe from the evidence that the plaintiffs instituted a suit against the said Walker, to the first term of the Franklin Circuit Court following the maturity of the note in said declaration mentioned, and that the said suit was unsuccessful by reason of the irregularity of the Clerk of the Franklin Circuit Court; and that, since the dismissal of said suit, the said William Walker has not been a resident of the State of Missouri, the plaintiffs have used due diligence in prosecuting their claim against Walker, and are in a position to maintain their action against the assignor of the note."

"If the jury believe from the evidence that before the first term of the Franklin Circuit Court following the maturity of the note in the declaration mentioned, the said Walker ceased to be a resident of the State of Missouri, and so continued up to the commencement of this suit, the plaintiffs are in a position to maintain their action against the assignors."

"If the jury believe from the evidence that the defendants assigned the note in the declaration mentioned, to the plaintiffs, by endorsement, the liability of the defendants thereon was not discharged, and they became liable to be sued by plaintiffs upon the occurrence of any of the circumstances mentioned in the statute as rendering the assignor of a note not negotiable liable to the holder."

"If the plaintiffs, being holders of a promissory note, not negotiable, sue the maker thereof, to the term of the court having cognizance of the suit, next following the maturity of the note, such suit is diligence, such as is sufficient to satisfy the statute."

"The holders of a note, not negotiable, are not obliged, in order to hold the assignor, to sue the holder by attachment. If the ordinary process of law, is not sufficient to realize for the holder, against the maker, the amount of the note or some part of it, he, the holder, is excused from proceeding by extraordinary means, such as attachment is."

"If the jury believe, that there were in June, July, or August, 1837, fraudulent conveyances of property by Walker, and further believe, that Walker was so insolvent on the 24th of August, and continued so down to the commencement of this suit, that a suit by these plaintiffs against him, could not have enabled them to recover the amount of the note here sued upon, they will find for the plaintiffs."

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"If the jury believe from the evidence, that on the 24th August, 1837, William Walker was so insolvent, and continued so down to the commencement of this suit, that a suit by these plaintiffs against him, would not have enabled them to recover the amount of the note here sued upon, they will find for the plaintiffs."

"The mere finding by the jury of the fact that Walker in the summer of 1837, made fraudulent conveyances of his property, is not sufficient to discharge the defendants, Ricketson & Holt, from their liability to pay the note here sued upon; but unless the jury further believe that on the 24th of August, 1837, or at some time between then and the commencement of this suit, that by suing Walker the plaintiffs could have made the amount of this note, they will find for the plaintiffs."

The court gave the following instruction on behalf and at the request of defendants:

"If the jury believe from the evidence, that Merry & Walker were partners in a mill and milling, and in the slave trade, and if they also believe from the evidence, that Walker's property was applied to secure Merry for the amount of his advances, for carrying on the partnership business, to the prejudice of Walker's creditors, the jury are at liberty to consider such application of the property as fraudulent." And refused the following:

"Unless the jury find from the evidence, that William Walker the maker of the note sued on, was from the time the said note became due, to-wit: from the 22d day of August, 1837, until the time of the commencement of this suit, a non-resident of the State or insolvent, so that a suit against him would have been unavailing, they ought to find for the defendants, as to the assignment of said note."

"In order to enable the plaintiffs to recover on the assignment of the note in question, it is incumbent on the *plaintiffs to prove*, and not the *defendants* to disprove, the insolvency of the said Walker, and it is not enough for the plaintiffs to prove, that Walker had not enough property to pay *all his debts*, but that in fact, a suit against him would be unavailing to gain money."

"If the jury believe from the testimony, that the property of Walker, which was transferred to Merry and to Payne, (as stated by the witnesses) was unfairly and fraudulently transferred to them, or either of them, they ought to find for the defendants."

Exceptions were taken to the opinions of the court, on the points of law decided, and the case brought here by writ of error.

The only question presented by the record grows out of the instruc-

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*Ricketson & Holt vs. J. & T. Wood & Co.*

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tions. The statute which regulates non-negotiable paper, declares that a suit against the maker of a note, must first be instituted by the assignee, unless a suit would be unavailing. The question in this case is, whether the insolvency of the maker must be such, that the whole debt cannot be made out of him, or whether the assignee is bound to prosecute his suit against the maker, where a *part* of his debt may be made. The court below, by its instructions, seemed to determine that a suit would be unavailing, unless the entire debt could be made.

We think the statute designed, that the assignor should be liable only for so much of the debt, as could not be made out of the maker by a diligent prosecution of the claim. The assignor was made liable on a contingency, and that contingency is the insolvency or non-residence of the maker, so that a suit against him would be unavailing. Could a suit be said to be unavailing where a portion of the debt can be made?—Where the debt is five thousand dollars, and the maker is able to pay three, or four thousand, shall no effort be made to collect this amount, merely because the whole debt cannot be made? This construction of the statute, will not, we apprehend, lead to impracticabilities, as has been suggested at the bar. We do not suppose that the plaintiffs must show, that not one cent or one mill could be collected; but merely, that a suit would be unavailing. Where the expenses of the suit would be likely to overreach the amount collected, the labor would be a fruitless one. The burthen of the assignor would not be lessened by such a proceeding. The juries who try questions of fact, will understand very well that the law does not tolerate impracticable niceties; and because a debtor is in possession of fifty cents, wherewith to pay a debt of a hundred or a thousand dollars, they will not be likely to consider it wisdom in the creditor to pursue such a debtor. The question will be easily determined by laying out of consideration the fact that there is an assignor. Let the creditor, (the assignee,) be supposed to have no other resource than the maker of the note, and then ask himself whether, under the circumstances, it would be worth while to sue. If it would be proper or expedient to institute a suit, in the case supposed, then it is due to the assignor, that under the same or similar circumstances, a suit should be instituted for his benefit.

The other Judges concurring, the judgment is reversed, and the cause remanded.

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*O'Fallon, Ex'r. of Delany vs. Kerr,*

O'FALLON, EX'R. OF DELANY vs. KERR.

1. To make liable the assignor of a note not negotiable, payable on demand, suit must be instituted at the first term of the court after the execution of the note—it being due as soon as made.
2. The assignee by deferring the demand cannot hold the assignor liable.
3. Where the makers were able to pay one third the note, a failure to sue them exempts the assignor.

ERROR to St. Louis Court of Common Pleas.

*GAMBLE & BATES, for Plaintiff, insist:*

1st. The note being a common note, not negotiable, payable at no particular day, but on demand, no action could arise upon it, until demand made.

2nd. As between the makers and the payee, the credit may be indefinite, without impairing the obligation to pay; and the contract of the assignor is only accessory to, and consequential upon the note, and must follow its nature, and share its fate.

3rd. The assignment in this case, (the object and design of it being fully explained in the testimony,) is a mere security for the debt; and a security is not discharged by a failure to demand payment or bring suit. See 8 Mo. Rep., 318, Marks vs. Bank of Mo.

4th. The note, bearing interest at 10 per cent. and no day fixed for payment, and the endorsement not being in the course of trade, but for the drawee's accommodation only—i. e. as a security—the holder was warranted in treating it as an investment of capital, to be continued as long as he pleased, and to be determined only by his demand of payment.

*SPALDING for Defendant in error, insists:*

1st. The defendant was not liable on the note sued on, 'till due diligence used against the makers by suit, or proof that such suit would have been unavailing, and due diligence was not used, nor is there proof of such facts as dispense with the same. See Statute on Bonds and Notes. 4 Peters, 366; 3 Dana, 596; 3 A. K. Marshall, 59; 3 Bibb, 6; 1 Bibb, 542; 2 Marshall, 255; 2 Peters, 338.

2nd. The note was due at once without demand and an action lies immediately against the maker, (13 Mass. Rep., 131, 137; 2 McCord, 246; 3 Wend., 213; 8 John., 189, 374; Chitty on Bills, and Story on promissory notes) and the same diligence was necessary on it, as on any other note when due. R. C., 1835, p. 105, § 9; 7 Mo. Rep., 417; 9 Dana. Rep., 45.

3rd. The requisite diligence was also due by the law Merchant on notes endorsed after due. 2 McCord, 398; 8 Serg. & R., 351; 1 McCord, 199; 9 John. Rep., 121.

4th. By the law merchant the endorsers of notes payable on demand were discharged, unless they were presented for payment in a reasonable time. Bailey on Bills, 221; ib., 135; 13 Mass. Rep., 131; 1 Cowen, 397; 2 Mason, 241; Chitty on Bills, 410, 412, 418; Story on Bills, § 325; 8th Greenleaf, 198; Story on Prom. notes, sec. 207.

5th. The judgment is right on the whole. This note could not have been evidence on the money counts; 2nd Bibb, 424; and there could be no recovery on the special count, or if there had been, judgment would have been arrested. 7 Mo. Rep., 266.



*O'Fallon, Ex'r. of Delaney vs. Kerr.*

NAPTON, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought by Delaney in his life time against Matthew Kerr, upon the following note :

"\$2080 01. St. Louis, August 17, 1842. On demand we promise to pay to M. Kerr or order, two thousand and eighty dollars and one cent, without defalcation or discount, and for value received, with interest from date at the rate of ten per cent per annum. J. & A. Kerr." It was assigned in the following words : "Pay to D. Delaney. Matthew Kerr."

On the trial the plaintiff proved a demand upon Beverly Allen, the assignee of Augustus Kerr, surviving partner of the firm of J. & A. Kerr, on the 15th July, 1844, and a notice to Matthew Kerr, on the following day. It appeared, that all the parties resided in St. Louis—that J. & A. Kerr were in merchantile business, and in excellent credit up to the death of J. Kerr, which took place in December 1843—that Matthew Kerr was the uncle of J. & A. Kerr, not engaged in any business, but was a mere accommodation endorser. No doubt was entertained, but that J. & A. Kerr would have paid the note, if it had been presented at any time before J. Kerr's death. At that time it was discovered that they were largely insolvent, and their assets would pay about 33 1-3 per cent. John Kerr's estate would not pay 3 per cent.

On this state of facts, the court, (to whom the case was submitted) was of opinion, that the plaintiff could not recover. A motion for a new trial was made and overruled.

The only question presented by the record, is whether the facts in proof made out a case of sufficient diligence on the part of the holder against the makers of the note, to authorize a recovery against the assignor.—The note is not so framed as to be a negotiable note within the meaning of our statute. The rights of the parties to the instrument have therefore to be regulated by our act concerning bonds and notes. The sixth section of that act declares that an action can be maintained by an assignee against an assignor, *only* where due diligence has been used in prosecuting a suit against the maker, or when the insolvency or non-residence of the maker renders such a suit unnecessary or unavailing.—Has due diligence been used in this case?

This note is payable on demand. It is conceded and all the authorities concur, that a note payable on demand is due immediately, that is, is payable on presentment—and suit may be instituted the day after the note is given. *Easton vs. McAlister*, adm'r., 1 Mo. Rep., 662. But it is

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*O'Fallon, Ex'r. of Delaney vs. Kerr.*

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argued by the plaintiff in error, that the holder may postpone a demand so long as he chooses, and the contract is not affected thereby; that the assignor is a mere security, and as such his liability is coextensive with that of his principal. This argument seems to proceed rather from a knowledge of the character and probable intentions of the parties to this note as inferred from the evidence on the record, than from any legal deductions drawn from the form of the instrument. A sufficient answer to such arguments is, that the law cannot be dispensed with to avoid the hardships of a particular case, and if a capitalist chooses to invest his money on such notes as these, he must be presumed to know the regulations which the legislature have prescribed for their interpretation. Here is a note given by J. & A. Kerr to Matthew Kerr, and assigned by Matthew Kerr to Dennis Delaney. Who that had ever read our statute book would suppose that such a note was given by the merchantile house of J. & A. Kerr, for money borrowed of Delaney, and was designed by the latter as a mere investment of money at interest, with M. Kerr for security? This, it is probable from the evidence, is so, but if such forms are adopted, with a view to the securityship of the assignor, it is apparent that they do not answer the object designed. The assignor is not a security, except *sub modo*. He is only responsible on a contingency.—Those who purchase such paper, look to the ability of the makers, if they suffer it to lie until after due. The holder cannot by deferring to make a demand for years, still hold the assignor responsible.

In the case of *Collins vs. Warburton & Risley*, (3 Mo. Rep., 203,) the declaration set out a suit, instituted against the maker of the note, eight months after the note became due; and this was not considered due diligence. The court said: "In this case we think the declaration defective in not averring that the suit was instituted *at the first term of the court after the note became due*, or showing some excuse therefor." In the case of *Harris vs. Harman*, (3 Mo. R., 450,) there was evidence to show, that the makers of the note were solvent and able to pay at the date of the assignment, and had so continued up to the time the suit was instituted against the assignor. The court directed a verdict for the defendants, if the jury believe the facts to be so.

In the case now under consideration, the note was due nearly two years before this suit was commenced, and for sixteen months after the note was due, the makers were able to pay and no demand was made or suit commenced against them. Nor has the administrator of John Kerr been sued, though his estate would, according to the evidence, pay a small dividend; nor the assignee of J. & A. Kerr, though the assets of

*Broomfield vs. The State, and Ward vs. The State.*

that firm will pay 33 1-3 per cent. Under these circumstances, we are of opinion no diligence has been shown, and the plaintiff cannot recover.

The other Judges concurring, the judgment is affirmed.

BROOMFIELD VS. THE STATE, AND WARD VS. THE STATE.

APPEAL from St. Louis Criminal Court.

SIMMONS, *for Appellants, insists:*

1. The Criminal Court erred in refusing the instructions asked by the defendant below.
2. The court below erred in rejecting the evidence offered by the defendant, that he had made application to the county court for a license to keep an inn and tavern, to date from the time his previous license had expired, and had, in all respects, complied with the act concerning the licensing of groceries in the city and county of St. Louis, approved Feb. 15, 1843, and that said court had refused him a license therefor.
3. The court erred in overruling the motion in arrest of judgment. The indictment is defective, for the reason that it attempts to set out the capacity or business in which the defendant was engaged, and yet does not allege that the act of selling was committed in that capacity. It is contended that it is necessary to set out the capacity of the defendant for the purpose of giving the court jurisdiction. The indictment contains two allegations; one that the defendant was a dram-shopkeeper, the other that he sold intoxicating liquors in quantities less than a quart. It not being alleged that he sold as a dram shop keeper, *non constat*, but he may have sold as a tavern keeper, in which case he could not be indicted at all, but is to be proceeded against in another manner.

STRINGFELLOW, *Attorney General, for the State, insists:*

1. The act regulating dram shops in the county of St. Louis requires that the applicant shall have been a resident of the State for two years, and of the county one year before his application, and also that a majority of the householders of the township in the country, or the block in the city, should petition for his license. It is insisted that the county court are alone vested with the power to determine whether these provisions have been complied with, and that their decision is final.

If the party have any remedy, he must have it against the county court.

A mere offer to comply with the law cannot give him the right to deal without a license. See Acts 1838-9, 1840-1, and Private Acts 1842-3, page 209; Rev. Code, 543.

2. The license from the city gives no right without a license from the county.

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NAPTON, J., *delivered the opinion of the Court.*

In each of the above cases, the indictments are alike the one in the case of Austin vs. the State. The judgments will therefore be reversed.

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BENTON, GARNISHEE OF THE BANK OF MISSOURI, vs. LINDELL.

1. Where the court, upon the submission of only one of the parties to a suit, improperly proceeds to try issues properly triable by a jury, its judgment is irregular, and no motion to set it aside is necessary.
2. The statute of limitations may be pleaded to a debt contracted in a fiduciary capacity.
3. A garnishee may set up the statute of limitations as a defence to his indebtedness.

ERROR to St. Louis Circuit Court.

GANTT, *for Plaintiff, insists:*

1. That it was erroneous and irregular in the Circuit Court to cause the issues of fact to be tried before the determination of the issues of law, and in fact, without making, up to this time, any disposition of the issues of law. Rev. Code of 1845, title Practice, page 816, sec. 1; Menefee vs. D'Lashmut, *et al.*, 1 Mo. R., 258.

2. That it was erroneous and irregular for the Circuit Court to take upon itself, without the express consent of both parties, the trial of an issue of fact, without the intervention of a jury.—Pratte and Cabanne vs. Corl, 9 Mo. R., 163; Sutton vs. Clark, 9 Mo. R., 559.

3. That an irregular judgment may be set aside for irregularity at any time within five years from the rendition thereof, and therefore the motion was not too late, being filed the subsequent term. Rev. Code of 1845, p. 831, sec. 8.

4. That there was no need of a bill of exceptions, and no need for the plaintiff in error to have excepted to the ruling of the court below, in order to present the case for review to this Court.—Carr vs. Edwards, 1 Mo. R., 137; West vs. Miles, assignee, &c., 9 Mo. R. 167.

GAMBLE & BATES, *for Defendant, insist:*

1. *There were no issues of law* in this case. The plaintiff had made *issues of fact*, by traversing parts of the answer; and also excepted to certain matter in the answer, not responsive to the allegations and interrogations, and vaguely invoking the statute of limitation, to protect him against the debts admitted by his answer. That part of the answer was wholly immaterial, and the plaintiff need not have noticed it. The only notice he took of it was to point out its objectionable character. He did not demur to it, and indeed a demurrer would have been inadmissible. R. C., p. 140-1, sec. 31, 32; and Tuttle vs. Gordon, 8 Mo. R., 152.

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*Benton, garnishee of the Bank of Missouri vs. Lindell.*

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The garnishee made no response to these exceptions, and so there is no pretence of an issue of any sort upon that matter. And the court, no doubt considering that whole matter immaterial, took no notice of it in determining this case.

2. If there had been *issues of law* in the case, the garnishee is wrong in supposing that it is an error for which the judgment ought to be reversed, that the *issues of law* were not determined before the trial of the issues of fact.

The statute does indeed say, (R. C., p. 816, sec. 1,) "when there are several issues of law and of fact in any suit, the issues of law shall be first determined." But that is only directory—a rule of convenience. Suppose two pleas to a declaration—issue on one of them, and demurrer to the other, and rejoinder—verdict of a jury for the plaintiff on the first, and afterwards a decision by the court on the demurrer in favor of the same party; the case comes here on writ of error, and this court finds both issues legally and rightly determined—is this Court bound to reverse the judgment simply because the issues, though *rightly* determined, were not determined in the prescribed order of time?

NAPTON, J., *delivered the opinion of the Court.*

Lindell recovered a judgment against the Bank of Missouri, in 1825, and not being able to make the debt by *fi. fa.*, sued out an attachment, under the statute, and summoned Benton as garnishee. This was in 1837. After a variety of proceedings, not material to be noticed, Benton filed his answer in 1841. The answer was excepted to, and the exceptions sustained. At the April term, 1844, a further answer was filed, which in substance denied all indebtedness to the Bank at the time of the garnishment, and relied also on the statute of limitations. So much of the answer as denied indebtedness was traversed, and exceptions were taken to that part of the answer which set up the statute of limitations. The objection to this part of the answer was, that the garnishee having been a corporator and director of said Bank, and owing the debt to said Bank in a fiduciary capacity, he could not avail himself of the statute. On the 22nd November, 1844, a motion was made by the garnishee to strike out the traverse to his answer and to overrule the exception taken to that part of the answer which relied on the statute of limitations.—This motion was overruled. On the 28th October, 1845, the following entry appears on the record: "Now at this day comes the said plaintiff, by his attorney, and not requiring a jury, therefore all and singular the premises are by him submitted to the court, which being seen, &c., the court doth find as to the first issue, &c., that the said garnishee was indebted, &c.," (proceeding to find all the issues for the plaintiff.) A judgment was rendered against the plaintiff in error for \$12,352.

On the 9th of January, 1846, the plaintiff in error moved to set aside this judgment for irregularity, which motion, on the 23rd March, 1846,



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was overruled, but no exceptions were taken. The record is brought to this Court by writ of error.

This case falls within the principle settled by this Court in the case of *Pratte & Cabanne vs. Corl*, (9 Mo. R., 164,) and *Sutton vs. Clark*, (ib. 559.) It appears upon the face of the record that the court, upon the submission of the plaintiff alone, tried the issues of fact, found a verdict upon them all for the plaintiff, and entered a judgment on this verdict.—To correct this error, a motion in the court below is unnecessary. *Pratt vs. Rogers*, 5 Mo. R., 53; *Carr vs. Edwards*, 1 Mo. R., 137; *Finney, Dobbys & Shade vs. State of Missouri*, 9 Mo. R., 634.

As the case goes back, it may not be amiss to notice the decision of the court in overruling the defence of the statute of limitations, although no exception was taken to this decision at the time. We have not been able to discover any thing in the letter or spirit of the statute of limitations which restricts its privileges to any particular class of debtors.—Nothing is said in the act from which it can be inferred that debts contracted in a fiduciary character are exempted from its operation, nor is there any thing in the phraseology or object of the statute which would preclude garnishees from its benefit. The statute was framed to protect persons from stale demands, which are presumed to have been paid, and the evidence of which payment the debtor is presumed to have lost or failed to preserve. If garnishees are understood to be excluded from the benefits of the act, it will be very easy, in all cases, to evade the statute entirely, by collusion between the creditor and a third person.—An indebtedness may be created by the creditor for the very purpose of defeating such a defence on the part of his debtor, and in this way the statute be rendered nugatory.

The other Judges concurring, the judgment is reversed and the cause remanded.

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BLAIR vs. PERPETUAL INSURANCE COMPANY.

1. A corporation has power to make any contract authorized by its charter, in a foreign government, if such contract be not prohibited by that government.
2. A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power.

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3. A corporation created for insuring property, has no power to engage in banking business.
4. Although the powers conferred on a corporation by its charter cannot be affected by legislation, yet corporations in other respects are subject to the laws, and their contracts in violation of the laws are voidable, or may be made void by law.
5. The liability of a surety is not to be extended by implication beyond the terms of his contract.
6. A surety for one as agent of a corporation, is limited to such acts as the corporation is authorized to require of its agent.
7. The St. Louis Perpetual Insurance Company has no right to engage in banking—and where one became surety for the fidelity of an agent of such corporation, he was not bound for an embezzlement by the agent of the funds of the corporation, while such agent was engaged in the business of banking for the corporation.
8. A surety is not bound by the admissions of his principal, unless made in the course of his business. A surety for an agent is not bound by his admissions after being discharged from his agency.

## APPEAL from St. Louis Circuit Court.

*POLK, for Appellant, insists:*

1. The pleas retained by defendant, and to which the plaintiff below demurred, particularly the 5th and 8th, were good, and consequently the demurrer thereto ought to have been overruled.—Acts of General Assembly, sess. of 1836-7, p. 215 and 189; sections 5 and 10 of the charter, Acts of 1842-3, p. 20, sec. 4.
2. The appellee's declaration is bad; it nowhere expressly avers that Homans accepted the office and appointment of agent of the appellee. Such acceptance is at most only matter of inference, from the facts stated in the declaration. *Serre, et al. vs. Wright*, 6 Taunt, 45; (1 Eng. C. L. R., 304;) *Jones vs. Williams*, Doug. 214.
3. The account stated between Homans and the appellee was incompetent evidence against Blair, who was Homan's security, and should have been rejected by the court. It was not made by Homans during the time and in the course of the discharge of the duties, for the faithful performance of which by Homans, Blair had bound himself; but after he had been suspended by the appellees in the discharge of those duties. See Hill & Cowen's notes to Phillips' Ev., p. 669, note 458, and the authorities there cited; *Goss vs. Wattington*, 3 Brod. & Bing., 132; (7 Eng. C. L. R., 379;) *Whitmarsh, et al. vs. Gifford*, 8 Barn. & Cres., 556; (15 Eng. C. L. R., 295;) *Middleton vs. Milton*, (10 Barn. & Cres., 317;) *Hotchkiss vs. Lyon, et al.*, 2 Blackford's Indiana R., 222; *Shelby vs. Governor*, 2 Blackford's Ind. R., 289; *Rial vs. Bick*, 3 Blackford's Ind. R., 242; *Evans vs. Beattie*, 5 Esp., 27; *Bacon vs. Chesney*, 1 Stark, 192.
4. The appellee, when he first closed his case, was not entitled to recover, and the court below ought to have given the instruction prayed by the appellant to that effect.
5. The court below committed error, to the prejudice of the appellant, by allowing the appellee, after having once closed his case, and after the court had instructed the jury in matters of law upon the case thus made, to re-open his case, and to recall and re-examine his witness, Ranlett.
6. The court below erred in refusing to give the instruction asked by the counsel of appellant, upon the close of all the testimony in the case.

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For authorities in support of this point, and the instruction to which it refers, see 2 Leigh's R., 157; S. P. Tindall vs. Bright, Minor's R., 103; Pauling, *et al.* vs. U. S., 4 Cranch, 219.

7. The court below committed error, prejudicial to the appellant, in the instruction which it gave, at its own motion, on the close of the evidence in the case.

8. The judgment rendered and entered up in this case is erroneous. See record, page 16; Rev. Code, title Penal Bonds, p. 782, sec. 6 and 8.

9. The court below ought to have set aside the verdict and granted appellant a new trial, not only because of the errors in law committed by it to the prejudice of the appellant, but also because of what is contained in appellant's affidavit, filed in support of his motion for a new trial.

*GANTT, on the same side, insists :*

1. That the declaration was bad, for two reasons; first, for not averring that Homans *accepted* the office of agent of plaintiff; (6 Taunt., 47) and secondly, for not stating how the moneys embezzled, &c. by Homans had come to his hands. Douglass Jones vs. Williams, page 214, (top paging) 8 T. R., 243, top page, overrules the above; and so judgment on the demurrer should have been for defendant.

2. That the pleas demurred to, especially the 5th and 8th, were good, constituted a bar to the action of the plaintiff, and the demurrer to them should have been overruled. Said pleas were good on grounds independent of statutory enactment. Petrie vs. Honnay, 3 T. R., 418; Steers vs. Lashley, 6 T. R., 61; 2 Bos. & Pul., 373; 3 Taunt., 10; 4 Taunt., 165; 3 Ves., 373; Moreck vs. Abel, 3 B. & B., 35; 5 Mass., 395; Howson vs. Hancock, 8 T. R., 575; 7 T. R., 630.

Secondly, they were in direct conformity to the law of the State. Sess. Acts of 1842-3, page 20, sec. 4, title Banking, act of incorporation of plaintiff; Sess. Acts of 1836-7, sec. 5, 11; Rev. Code of 1845, title Banking, sec. 7 and 10, page 167 and following.

3. That the court erred in permitting the accounts stated between Homans and Perpetual Insurance Company to go to the jury in this action. 5 Esp., 26, 27; 3 Harr. & McH., 242; 3 Yeates, 128; 2 Blackford's Reps., Hotchkiss vs. Lyon, 222; *ib.* Shelby vs. Gov. of Ind., 26; 1 Dana, 177; Davis vs. Whitesides; Cluggage vs. Swan, 4 Binn., 150; 6 Binn., 1, 2; Longenecker vs. Hyde, 2 J. J. Marsh., Thomas vs. Thomas, 60; Price vs. Thornton, *et al.*, 10 Mo. R., 135.

4. That the circumstance of there being no plea denying the embezzlement, &c., makes no difference as to the character of the testimony required for fixing the amount of damages recoverable by the plaintiff. Even in case of no plea and judgment by default, an enquiry was necessary. Without testimony to establish this amount, the plaintiff could only have had judgment for nominal damages, if indeed he could have had judgment for any damages at all—even one cent. See Rev. Code of 1844, page 815, sec. 42; *ib.*, page 782, sec. 7, article Penal Bonds; and see Goss vs. Wattlington, 3 Brod. & B., 132, where there was judgment by default, and testimony like the present excluded.

5. That the court below erred in permitting plaintiff to recall his witness after he had closed the case on his part, and give further testimony after the defendant had prayed the opinion of the court on the case made.

6. That the court erred in refusing to instruct the jury as prayed by the defendant, after offering the testimony of Harrison.

7. That the instruction given to the jury by the court of its own motion, was erroneous in this: that it made to them a suggestion to indulge a presumption not warranted by the evidence disclosed in the cause. Hollister vs. Johnson, 4 Wend., 639; Haine vs. Davy, 4 Ad. & El., 899; and also in withdrawing matters of fact from the jury.

8. That upon the finding of the jury, only nominal damages could have been adjudged to the plaintiff, and that the court ought to have granted the motion of the defendant to instruct the clerk to enter up judgment accordingly. Rev. Code of 1845, title Penal Bonds, sec. 6 and 8, p. 782.

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9. That for the reasons assigned, the court below should have set aside the verdict and granted a new trial; and for not doing so, the judgment of the court below should be reversed.

**GAMBLE & BATES, for Appellee, insist:**

1. The demurrer to the pleas was rightly sustained; for the charter is not forfeited by the commission of the acts stated in the pleas, but can only be forfeited by the will of the sovereign, in a proceeding instituted for that purpose. *Angel & Ames on Cor.*, p. 507, 664-5.

2. The court rightly refused the instruction moved by defendant, "that upon the evidence given by the plaintiff in the case, the plaintiff is not entitled to recover," because the record not only does not show a total lack of testimony on the part of the plaintiff, but on the contrary shows a good case well proved.

3. The court committed no error in allowing the plaintiff to recall the witness, Ranlett, and examine him touching a demand made on Homans for the balance due. 7 Mo. R., 115; 8 Mo. R., 26, *Brown vs. Barnes*.

4. The court committed no error in refusing to give the instruction, No. 3, as moved by the defendant.

5. The final instruction given by the court to the jury, No. 4, was legal and right.

6. Independently of the instructions, the plaintiff, on the face of the record, was entitled to the verdict. There is no plea to the breach; *non est factum*, without oath, admitted the bond; and the plea of *fraud* was for the defendant to prove affirmatively. The breach was traversable, and not traversed, and therefore admitted; and the breach alleges that Homans had applied the \$3,000 to his own use. The money in the hands of Homans was never employed in the alleged illegal business: the worst that can be said is, that the plaintiffs intended to misuse the money, but Homans prevented them by converting it to his own use.

7. Besides, no demand upon Homans was necessary, and so the instruction to the jury on that point was wrong.

Even in trover, if the defendant come lawfully into possession, and afterwards convert the goods, no demand is required to precede the action. 3 Mo. R., 270, *Himes vs. McKinney*.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of debt on a bond in the penalty of \$2,000, by the appellee (plaintiff below) against the appellant, as surety of J. J. Homans, who was agent for the appellee. The condition of the bond, after reciting that Homans had been appointed agent for the St. Louis Perpetual Insurance Company, provided that it should be void if the said Homans should well and truly perform all the duties of the said appointment, as the same should be prescribed by the Board of Directors thereof, from time to time; and should faithfully preserve and account for all the moneys of the said company, which were or should thereafter come into his hands by virtue of his office, as might be required by the bye-laws or authority of the Board of Directors of said Company. The declaration alleged that on the 1st May, 1844, said Homans, as such agent of the plaintiff, had received, and there had come to his hands by virtue of said

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office, of the moneys of the plaintiff, the sum of \$3,000, which he did not faithfully, honestly, and fully preserve and account for, as he was required to do by the authority of the Board of Directors; but, on the contrary, misapplied and disposed of the same to his own use. The bond was dated 1st November, 1843.

There were ten pleas to the action—*non est factum*, and nine special pleas; the 2nd, 5th, 8th and 10th of which will only be noticed, as the others, after being ruled bad on demurrer, were stricken out by consent.

The 2nd plea in substance avers that Homans, the agent of the company, was employed out of the limits of this State, in New Orleans.

The 5th and 8th, which are nearly the same, substantially aver, that before and since the breach of the condition in the declaration mentioned, the plaintiff was and had been engaged in the business of banking—that is to say, in receiving from individuals money on deposit and keeping an account therefor and thereof with such depositors, after the manner and fashion of bankers; in using the money so deposited as a fund for discounting such promissory notes, and buying such bills of exchange, as were offered to and approved by said plaintiff, and in buying and selling bills of exchange, for the purpose of clearing the profits and emoluments incident to such business; which said business, in all its said branches, was illegal and unlawful to said plaintiff, and foreign to and a misuser of the objects of the charter of incorporation of said plaintiff, and the powers granted thereby; and with a view of carrying on said business more extensively, that the said Homans was sent to New Orleans, where he remained from the 1st November, 1843, until the 1st May, 1844, in said employment, and that whilst so employed, the breach in the declaration mentioned was incurred. The 10th plea alleges that the bond was obtained by fraud and covin. Issues were taken on the 1st and 10th pleas, and demurrers were filed to the 2nd, 5th and 8th, which were sustained. There was a judgment for the plaintiff for \$2,000, which was entered in this manner: "Therefore it is considered by the court that the said plaintiff recover of the said defendant the damages aforesaid by the jury assessed," &c.

On the trial, the bond was read in evidence, and an account shown to be in the handwriting of Homans, by which it appears that he, on the 31st May, 1844, acknowledged himself indebted to the plaintiff in the sum of \$3,000. The reading of this paper was excepted to by the defendant.

The plaintiff having closed his evidence, the defendant moved the court to instruct the jury that the plaintiff could not recover without



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proving a demand on Homans for the balance claimed, and that on the evidence the plaintiff was not entitled to recover. The court gave the first, but refused the last of these instructions. The court then permitted the plaintiff to give evidence touching the demand made on Homans.

There was some evidence under the plea of fraud, and some instructions growing out of it, which it will not be necessary to notice.

An objection was taken to the plaintiff's declaration, that it did not aver that Homans had accepted the office of agent of the plaintiff, and that it did not allege how the moneys not accounted for by Homans came to his hands, and the cases of *Serre vs. Wright*, 6 Taun., 49, and *Jones vs. Williams*, Doug., 214, were cited in support of these objections. As to the defect that it does not appear in what manner the moneys came to the hands of Homans, it may be observed that the case of *Jones vs. Williams*, cited in support of the objection, is expressly overruled by the case of *Barton vs. Webb*, 8 T. R., 455. The appointment of Homans to an agency was no office, and the averment in the declaration that as agent he received the sum of money not accounted for, is a sufficient allegation that he did enter upon the duties of his appointment.

The demurrer to the second plea was rightly sustained. It cannot be maintained that a corporation is incapable of transacting business beyond the territorial limits of the government by which it is created. In the case of the *Bank of Augusta vs. Earle*, 13 Pet., 521, the question of the right of a corporation to make contracts in another State than that of its creation, received a full examination by the Supreme Court of the United States, and the result was declared in the clear and satisfactory opinion of the Chief Justice. It was determined that a corporation keeping within the scope of its general powers, and having authority by the law of its creation to make the contract, could contract in foreign governments, if such contract was not prohibited by the laws of that government. The doctrine of this case had been previously declared in several of the States, and may be considered as settled.

The question presented by the demurrer to the 5th and 8th pleas, is an important one, and merits full consideration. By the common law, every corporation had certain incidents annexed to it, which arose and adhered to it by the act of incorporation. An enumeration of these incidents is unnecessary here, as they are to be found in all the books on this subject. The incidental powers may be and are frequently restrained by the terms of the charter. When they are not thus restricted, they can only be exercised for the purpose of carrying into effect the ends for which the corporation was designed. It is a well settled principle that

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a corporation has no other powers than those which are specifically conferred upon it, and those which are necessary to carry into effect the powers expressly delegated.) In the case of *Beatty vs. Lessee of Knowler*, 4 Pet., 152, it was said by the Supreme Court of the United States, "the exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." A corporation and an individual do not stand upon the same footing in regard to the right of contracting. The latter may make all contracts which in the eye of the law are not inconsistent with the interests of society; whereas, the former, (being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It can not only make no contract forbidden by its charter, but it can only make those which are necessary to effectuate the purposes of its creation.) "If the object of the corporation is to insure property, it cannot exercise the power of acting as a banking institution.)" *Angel & Ames on Corporations*, 66.

"Although it has been settled by the courts of the United States that acts of the State Legislatures divesting corporations of any right conferred by charter, as a right to make particular contracts, are void, as impairing the obligation of the charter, which is a contract within the meaning of the Federal Constitution; yet it is clear, that except so far as they are privileged, by the instrument of their creation, corporations, like individuals, are subject to legislative action; and all contracts made by them, in violation of the laws of the land, are voidable or may be made void by legislative enactment. *Angel & Ames*, 795. The act incorporating the plaintiff gave it the same powers and subjected it to the same liabilities as were conferred and imposed on the *Farmers' & Mechanics' Insurance Company of St. Louis*. Sess. Acts '36-7, page 215-16. The *Farmers' & Mechanics' Insurance Company* was authorized to make all kinds of insurances on goods, merchandize, and lives, and all other kinds of insurance; to lend money upon respondentia and bottomry; to lend its surplus and unemployed money or capital at interest, and to insure itself against losses upon its own insurances. The said company was prohibited from employing any part of its funds in buying and selling goods, wares and merchandize, or any commodity whatever, and any brokering operation or business. *Ibid*, pages 190-1. The 4th section of the act of February 28th, 1843, prohibited all corporations within the limits of this State from exercising any banking privileges, either by issuing notes or any species of any paper currency whatever, or by receiving money on deposit, or by discounting notes, bills or bonds;

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or by dealing in exchange; or by lending and collecting, or by doing any other banking business whatever. Admitting that these prohibitions, so far as they attempted to arrest the exercise of any franchise previously conferred by the General Assembly on the plaintiff, were inoperative and void, as violating the prohibition on the States not to impair the obligation of contracts; yet so far as they steered clear of this objection, they were clearly obligatory and binding on all corporations. From the above enumeration of the powers conferred on the plaintiff, it is obvious that it had no authority to engage in the business in which Homans is alleged by these pleas to have been employed. *New York Fire Ins. Co. vs. Ely*, 2 Cow., 678.

In the case of *Miller vs. Stewart*, 9 Wheat., 702, it is said "nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of the contract.")

The undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. It has been held, that if a person engages as surety to a particular individual, the engagement is understood to be only to that individual, and it ceases if he takes a partner, or it will not extend to matters in which his partner is interested. *Wright vs. Russell*, 2 Black., 934. So a surety for the fidelity of a clerk is not liable, in respect of a breach of trust, upon an employment of the clerk by the trader's executors. *Barker vs. Parke*, 1 Term. So if a person engage as surety to several individuals, the engagement is understood to be to all of them collectively and jointly, and if any of them die, it will not be available in respect of transactions afterwards by the survivors. *Weston vs. Barton*, 4 Taun., 673. So if the surety's engagement relates to a particular office, it extends to such things as were included in the office when the engagement was entered into. *Story on Contracts*, 353. So if a person engage as surety to a particular individual, the engagement is understood to extend to the acts of that individual alone, and will not continue if he take a partner. *Blair vs. Ellsworth*, 3 Camp., 52. In the case of *Leigh vs. Taylor*, 7th Barn. & Cres., which was an action upon a bond against the defendant, as surety of Hutton, who, it was recited, had been duly elected overseer, and the condition was for Hutton's accounting for all sums which should

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!ome to his hands by virtue of his office as overseer. It appeared among the items in his account, and for which he was indebted, there was one for money which he had borrowed for parochial purposes, without the direction of the parishioners. The court held the sum ought not to be charged against the surety, because it was no part of the duty of an overseer to borrow money. In the case of *Dedham Bank vs. Chickering*, 4 Pick., 314, the court say, the contract of the sureties is only for the faithful performance of those trusts that properly and legally belong to the cashier of the Bank. But in respect to bills illegally issued by the Bank, the surety was not responsible for the fidelity of the cashier in respect to these, because he was not acting within his duties as cashier, but as an agent in an unlawful traffic. The directors cannot require a duty of a cashier not belonging to his office, and thereby throw a burden upon a surety beyond the meaning of his contract.

When Blair was solicited to become the surety of Homans, he would naturally look to the charter of the plaintiff, in order to ascertain the extent and nature of the powers which it could exercise. These would inform him of the character of the obligation he was contracting. It could not be supposed that he would make himself liable for the conduct of Homans, in whatever employment he might be engaged. An individual may be willing to guaranty the fidelity of another in one employment, when he would be very far from doing it in an employment of a different nature. An undertaking for the fidelity of another as agent for a corporation, is limited to such acts as the corporation, by its charter, may lawfully require an agent to perform. The liability of the surety could only attach whilst the agent was employed in the discharge of duties which the charter gave it a right to impose.

The admission in evidence of the account rendered by Homans, in which he charges himself with the amount for which the action is brought, brings up the question, how far the admissions of a principal will affect his security. In the cases which have arisen on this subject, the enquiry has been whether the declarations were made, in the course of the business for the performance of which the surety is bound, so as to become a part of the *res gestæ*. If the declarations are made under such circumstances, they are binding on the surety; otherwise, not. The rule being, that a surety is bound for what his principal does, and not for what he might say he had done, therefore, if one is liable on a bond as surety for the good conduct of another as clerk, it has been held that, in an action against the surety, the declarations of the principal, made after his dismissal, were not evidence against him, though it would be otherwise

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in regard to entries made by the clerk in the course of his employment. *Smith vs. Whittingham*, 6 Carr & Payne, 78. As there was no plea denying the truth of the breach of the condition of the bond assigned in the declaration, the plaintiff was entitled to a verdict without proof of the admission contained in the account given in evidence.

There was no error in permitting the plaintiff to give evidence of a demand, after he had closed his case and after the instruction of the court. The fact that the suit was against a surety, could surely make no difference: it should not in the least have influenced the exercise of the discretion of the court. This subject has been so frequently before this Court, and so repeatedly has it refused to interfere with the discretion of the Circuit Courts in relation to it, that it would seem useless any longer to raise such points. If evidence comes in out of its order on a trial, and the judgment should for that cause be reversed, will it not on the second trial be introduced in order and bring about the same result as in the first trial?

The judgment was improperly entered in this case. The statute concerning penal bonds is express that the judgment shall be rendered for the penalty of the bond, as in an action of debt, with an award of execution for the damages assessed. As the judgment will be reversed for other causes, this matter would not have been noticed but for the fact that the court, after its attention had been called to the error, which it does seem is very apparent, refused to correct it, when the record was in its power.

The other Judges concurring, the judgment will be reversed and the cause remanded.

PERRY & VAN HOUTEN vs. BEARDSLEE & WIFE.

The hirer of a slave is not responsible for his running away, unless it be by some fault of the hirer. This must be shewn by the plaintiff—no general rule can be laid down as to the care to be taken by the hirer to prevent an escape, nor as to the efforts to effect a recapture; these depend upon the nature of the service in which the slave is engaged, and the circumstances attending the escape as well as the character of the hiring.



*Perry & Van Houten vs. Beardslee & wife.*

APPEAL from St. Louis Circuit Court.

*GANTT, for Appellants, insists:*

1st. The court erred in refusing to permit the defendants below to prove, what was the custom of trade and general usage, in cases of hiring slaves to steamboats. 2 Greenleaf on Evidence, § 251, and cases there cited.

2nd. The court erred in refusing to instruct the jury, as prayed by defendants, as to the degree to which the liability of defendants was modified and changed by the nature of the property hired, and the incompatibility of his being at all serviceable as a servant with his being placed in such surveillance as would ensure his not escaping at will from the boat. McDonald vs. Clark, 4 McCord, 223; Boyce vs. Anderson and others, 2 Peters, U. S. Rep., 150.

3rd. The burden of proving the default of the defendants, their carelessness or negligence, is on the plaintiffs in an action like this, and is not to be presumed, but proved. 7 Mo. Rep., 430, Christy vs. Price's adm'r.

4th. The judgment is erroneous as against Durst, who was not served with process, and did not appear to the action. 7 Mo. Rep., Bascom vs. Young, page 1.

*TODD, for Appellees, insists :*

1st. The court did not err in not suffering the aforesaid question to Carlisle to be answered, and the admission of proof subsequently offered by the defendants, of a custom and usage releasing boats from responsibility for hired slaves, who runaway.

2nd. The court did not err in giving the instructions asked for by plaintiffs. 6 Mo. Rep., 323.

3rd. The court did not err in refusing the instructions asked for by defendants, designated as Nos. 2, 7, 8, 9, 10, 11, and 12.

4th. The instructions given, taken altogether, were a fair and sufficient exposition of the law of the case under the evidence, and this is sufficient. 7 Mo. Rep., p. 128.

5th. As this court will not reverse because of erroneous instructions given, provided the party complaining has sustained no injury thereby, (6 Mo. Rep., 301; 7 Mo. Rep., 416, 419;) so, it should not reverse because of the refusal to give a right instruction, if the party complaining is not thereby injured.

6th. The defendants assign as one cause for a new trial, that the court instructed the jury orally and have not preserved those instructions. If this is evidence to this court of the fact, then the court is not fully possessed of the case, and cannot know but the court below did instruct the jury, as desired by the defendants in Nos. 2 and 10.

7th. The verdict is according to the evidence and law under the evidence.

8th. The action was properly conceived. References to authority on this point, certainly cannot be needed. If so, see 1 Blackstone Com., p. 443, and note thereto.

*NAPTON, J., delivered the opinion of the Court.*

Beardslee and wife brought an action on the case, against Perry and others, owners and officers of the steamboat "Harry of the West," to recover damages for the loss of a slave, hired as a fireman on said boat. The plaintiffs obtained a verdict and judgment.

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The evidence on the trial conducted to show, that the slave belonged to Mrs. Beardslee, then Miss Smith—that he was white, with blue eyes and light sandy hair; that her agent, John Carlyle, hired the boy to Van Houten, captain of the *Harry of the West*, by the month and for no definite period. The boy made his escape at St. Louis. A letter was addressed to Carlyle, by Mr. Sparr of the Virginia Hotel, where Carlyle usually boarded when in St. Louis, at the instance of Van Houten, which requested his presence in St. Louis on business, and when Carlyle arrived there from Alton, where he was at the receipt of the letter, he found that the negro had escaped, and he settled with Van Houten for the hire.

The defendants offered to prove, that according to usage and custom, prevailing among steamboat owners and masters, the latter are not considered responsible for slaves hired by them, in case of their running away, unless by express agreement. This evidence was rejected.

The court, at the plaintiff's instance, instructed the jury as follows:

"It is the duty of the hirer of a slave, in case the slave runs away, to use such diligence for retaking the slave, as a diligent owner would use, and in a suit against a hirer for such a loss, unless the hirer *prove* such diligence on his part to retake the slave, he is liable for the loss. If therefore the jury in this case, on this principle find the defendants guilty, they ought to find for the plaintiffs and assess their damages at the value of the slave at the time of his loss, with interest."

At the instance of the defendants, the court gave the following instructions:

"If the jury believe from the evidence, that the negro David was hired to the owners of the steamboat *"Harry of the West;"* that while in their service he ran away, and has been lost to plaintiffs without fault, carelessness or negligence on the part of said owners, then the jury will find for defendants."

"The law of bailments, leasing or hiring property generally, is not construed as rigorously, in the case of a negro hired to another; and the jury is authorized to consider the peculiar circumstances of the country, the vicinity of the city of St. Louis, and the State of Missouri to free States, the difficulties of retaining negroes in slavery, the age, character, sagacity, color and general appearance of the negro David, in connection with the defence."

"The burden of proof is on plaintiffs, to show that the negro David's running away was caused by the misconduct, fault, carelessness or negligence of defendants, and without such proof the jury should find for defendants."

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"This being an action on the case for wrongs alledged, the plaintiffs are not entitled to a verdict, unless the jury believe from the evidence, that defendants were guilty of such carelessness or negligence, as caused or allowed of the negro's running away."

"If the jury believe, that the negro David was hired to the owners of the steamboat Harry of the West, before plaintiffs can recover in this action, they are bound to establish by evidence, that a demand was made for the negro, *before* the suit was brought."

The court refused to give the following instructions, asked by the defendants:

"If the jury believe from the evidence, that the negro David ranaway from the Harry of the West without fault, carelessness or negligence on the part of said owners, they will find for defendants, although said owners did not use the extreme diligence that the owner might be disposed to use to retake him, and they were not bound to encounter as great expense as the owner of the slave might be willing to encounter, in case the negro escaped to a distant country."

"This being an action on the case for torts, the plaintiffs cannot recover, if the jury believe from the evidence, that the negro boy David, when he ranaway, escaped to Cincinnati, Ohio, or any other free State, without the permission, connivance, carelessness or negligence of the defendants."

"If the jury believe from the evidence, that the boy ranaway, and escaped to Cincinnati, Ohio, or any other free State, the defendants were not bound as matter of diligence, to make pursuit, nor to incur heavy expenses in making efforts to retake him."

"If said negro ranaway to Cincinnati, Ohio, without fault, negligence or carelessness on the part of defendants, and without unreasonable delay, the fact was communicated by defendants to the plaintiffs, or either of them, or their lawful agent, or any of them, who immediately made reasonable efforts to ascertain where said negro was, and to recapture him, without success, the defendants are entitled to the benefit of such efforts in the mind of the jury, as if made by defendants, as bearing upon the question, whether the plaintiffs have been really damnified, or injured by any omissions of defendants, in the matter of efforts to recapture said negro."

"If the jury believe from the evidence, that pursuit of said boy David, to recapture him, would have been unavailing and useless, and that he ranaway and reached the State of Ohio, or any other free State, without the connivance, carelessness or negligence of defendants, and that ef-

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forts to retake him would have caused extraordinary trouble and expense, the law applicable to this action, does not consider plaintiffs as damnified by defendants, and there should be a verdict for the defendants."

"The duties of the bailee of a slave, as to care of the slave and diligence, so as to prevent his running away, are to be considered by the jury in connection with the circumstances of the country, the nature and appearance, and sagacity of the slave himself, and the difficulties of holding such property or preventing negroes from running away."

"The plaintiffs are not entitled to recover of defendants, merely because fresh pursuit was not made after the negro by defendants, or no efforts were made by them to retake him, if they believe from the evidence, that such pursuit and such efforts would have been unavailing."

The points were preserved by bill of exceptions, and the case brought here by appeal.

This case seems to have been decided under a misunderstanding of some expressions which were used by the Judge, who delivered the opinion of this Court in the cases of *Ellett vs. Bobb*, 6 Mo. R., 324; and *Perkins vs. Reed*, adm'r., 8 Mo. R., 33. The language of the court in those cases may not have been sufficiently guarded, and may require explanation. The first instruction given by the court, in the case now under consideration, declares it "to be the duty of the hirer of a slave, in case the slave runs away, to use such diligence for retaking the slave as a diligent master would use," and that a failure in this respect would make him responsible for the loss. This instruction is couched in the language used by this Court, in the case of *Ellett vs. Bobb*. The fifth instruction which the court also gave, at the instance of the defendants, was as follows: "This being an action on the case, for wrongs alleged, the plaintiffs are not entitled to a verdict, unless the jury believe from the evidence, that defendants were guilty of such negligence or carelessness, as caused or allowed the negro's running away." These two instructions would appear to conflict; for the first makes it the duty of the bailee to use diligence in retaking the runaway slave, and makes him responsible for a neglect of such diligence, and the last declares the plaintiffs not entitle to recover, unless there has been some carelessness or negligence in permitting the escape.

If it had been intended by the first instruction, that the failure of the bailee to use reasonable exertions to retake the slave, in a case where the propriety of such exertions was shown, would be evidence of a negligent or permissive escape, the instruction would be unexceptionable and not inconsistent with the one which followed. But before such an in-

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struction could with propriety be given, there ought certainly to be some foundation for it, in the testimony, showing the circumstances under which the escape took place.

The Circuit Court adopted the language of this Court, in the case of *Ellett vs. Bobb*, and applied it literally to the case at bar. In the case of *Ellett vs. Bobb*, and the subsequent case of *Reed vs. Perkins*, this Court very distinctly recognized it as the duty of a bailee of a slave, to use some exertions to retake one who had runaway, and at all events to give *immediate* information to the owner. The question in those cases was not however calculated to require any particular explanation of the nature and extent of this duty. The only question there discussed, was whether the bailee or the owner, where an escape took place, should bear the loss, or how it should be divided between them. We see no reason to retract the opinions expressed in those cases, provided they be understood with reference to the circumstances of the case, and in a restricted sense. It must be manifest, that this Court never designed to declare it a rule of law, that a bailee of a slave, for a month or a year, was bound to pursue him, after he had escaped, to Cincinnati or Canada. It is obvious that the ideas of escape and recapture, were intimately associated, and were designed to be limited by time and circumstances.—It would have been better, perhaps, to have declared, that a failure to use reasonable exertions to retake a runaway slave, would be evidence of a negligent or permissive escape. What exertions would be reasonable, or whether the circumstances under which the escape took place, would require any, on the part of the bailee, would be a proper subject for enquiry in a given case.

It would be impracticable to establish a general rule, applicable alike to all cases. A slave, for instance, is hired in the country, his master living in one county, and the bailee living in another and distant county. The slave disappears, and as frequently happens, he is concealed in some neighboring cabin or woods, and information of this is communicated to the bailee. Would he be held justified in failing to have the slave retaken? In such a case it will be seen at once, that the failure to retake the slave, before a final escape was made, would show a dereliction of duty on the part of the hirer, which might be productive of the greatest mischief to the owner. Exertions used in time, and before the escape can be considered as absolutely effected, may be sufficient to secure the slave; and, if those exertions be omitted, it may be impracticable, with every exertion on the part of the owner, subsequently to get his slave. The omission of such exertions as these would be a breach of



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that good faith, which is understood to attach to the contract of time. The escape would in short, be a permissive one; it could not be regarded as having taken place, without the fault or negligence of the bailee. And this brings back the question, at last, to the same principle asserted by the Circuit Court in the fifth instruction, and which we suppose must govern all cases of this character.

The circumstances attending the hiring of slaves upon steamboats, are certainly proper to be considered in connexion with the duties of the bailees. The nature of the contract is not altered by this circumstance, nor is the responsibility of the hirer different. But what would constitute negligence and bad faith in the one case, might not be so considered in another. Where a slave is hired as a boat hand, we must presume that the owner is fully aware, that every facility for escape is afforded by the very nature of the service. He is apprised, that the boat will touch and be detained at the wharves of populous towns; that it passes near the banks, and will stop at the landings of States where slavery is not tolerated; and that his slave will be associated with free negroes, and others who will not be likely to leave him in ignorance of the various opportunities which present themselves for escape. The owner is aware of all this, and must be presumed to contract with reference to it. He insures his slave, or indemnifies himself for the increased risk by increased wages. Does the owner expect, that in case his slave escapes, whilst the boat is lying at a wharfe, or putting out freight at some intermediate landing, the captain and crew will relinquish the boat, or abandon the trip, for the purpose of hunting up the runaway? No such expectations are entertained. The captain or master is expected to act with good faith; he is bound to do so; but he cannot be expected in circumstances like those described, to use even the same means of recapture, which a bailee under other circumstances might be required to exert.

In the case at bar, the evidence on the record is entirely silent, as to the mode or circumstances under which the escape took place. It only appears that the slave was missing at St. Louis; and was afterwards seen in Cincinnati. Whether he was lurking about St. Louis, for some time after his escape, or on an adjoining boat, or the same boat, and could have been easily retaken, or whether he made an immediate escape from the city, does not appear. It does not appear in what way, or at what time the slave escaped, nor whether both time, place and mode were unknown. It would seem the duty of the plaintiffs to show some evidence, so as to make out a *prima facie* case of negligence, if negligence existed, without requiring him to prove a negative. If circumstances calcu-

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lated to throw a suspicion upon the conduct of the bailee be shown, the jury will readily enough draw unfavorable inferences, if the defendant does not explain them, when he has it in his power to do so. There are no obstacles to the plaintiff's recovery, on the score of the burden of proof, if a case exists which would authorize a recovery. The present case, under the instructions of the court, may have turned upon the mere fact, that no proof was shown of any efforts to retake the slave. It did not appear whether such efforts would have been proper, or necessary, and though the jury were told, that it devolved upon the plaintiffs to make out a case of negligence, or carelessness, yet the instruction given for the plaintiffs, and the refusal of the 11th and 12th instructions asked by the defendants, may have induced the opinion that the defendants were bound to show some efforts to recapture the slave, before any suspicion was thrown upon the propriety of their conduct, by the evidence of the plaintiffs. Under these circumstances we shall award a new trial.

The other Judges concurring, the judgment is reversed and the cause remanded.

*McINDOE vs. CITY OF ST. LOUIS.*

In an action of ejectment brought by the City of St. Louis, for a lot purchased by the city, the defendant cannot set up the illegality of the ordinance authorizing the purchase. The acceptance of the deed by the city vests the legal title in her, whether the ordinance be valid or void.

## ERROR to St. Louis Circuit Court.

*SIMMONS, for Plaintiff, insists:*

It is an inflexible rule, to which there is no exception, that in an action of ejectment it devolves upon the claimant to show a good and sufficient legal title to the premises sought to be recovered. If there be any weakness or defect in the claim of the defendant, the plaintiff will not be assisted by it. Adams on Ejectment, p. 28, 285; 9 John. Rep., p. 55; 4 John., 483; 2 Overton, 185, 334; 3 Watts, 95, 151; 1 Marsh, 251; 6th Binney, 434; 3 Litt. Rep., 25; 8 Cowen, 543; 6 Wen., 666; 5 Wen., 572; 3 Serg. & Rawles, 283; Tomlin's Law Dictionary, p. 617.

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**KNOX, for Defendant, insists:**

1. The judgment of the St. Louis Circuit Court, which the defendant seeks to reverse, is not a *final* judgment, and that no writ of error lies to reverse the same. Rev. Stat. of 1845, page 901; 3 Wheaton, 433, *Houston vs. Moore*.

2. That ordinance No. 1494, authorizing the purchase of the lot in question, was not "a tax bill," nor "a bill appropriating the sum of five hundred dollars or upwards," nor "a bill in any wise increasing or diminishing the city revenue," and did not require for its passage a majority of all the members elected of each board of the City Council, as is provided in City Charter, article 2nd, sec. 21.

3. If the said ordinance No. 1494 did require a majority of all the members elected of each board, the defendant, McIndoe, cannot avail himself in this action of the alleged irregularity in the passage of said ordinance, and the judgment of the Circuit Court, in reversing the decision of the St. Louis Court of Common Pleas, for admitting the evidence upon this subject, was not erroneous.

4. The legal title to the lot of ground in question was vested in the plaintiff, the city of St. Louis, by the deed from A. Valle and wife, even if the bonds issued by said city for the same were absolutely void.

**NAPTON, J., delivered the opinion of the Court.**

This was an action of ejectment brought by the city of St. Louis to recover a lot of ground in possession of the defendant. The suit was first tried in the Court of Common Pleas, where the plaintiff suffered a non-suit, and upon failing to have the non-suit set aside, the case was removed by writ of error to the Circuit Court. The trial in this court resulted in a verdict and judgment for the plaintiff.

The property originally belonged to the estate of Therese Cerre Chouteau, deceased, and was sold by her administrator to one Amade Valle, who conveyed the same by deed to the city of St. Louis. The defendant had occupied the premises for some time previous to the commencement of the suit, as a tenant under the administrator of Mrs. Chouteau's estate.

The defence set up in the court below was, that this lot or part of a block was purchased, or attempted to be purchased, by the city authorities, at the price of fifty thousand dollars, by virtue of an ordinance of the city, entitled "An ordinance authorizing the purchase of a part of Block No. 7;" and that this ordinance was a nullity, because it had not passed the Board of Aldermen by the number of votes required by the charter to pass "a tax bill" or "a bill appropriating for any purpose a sum of five hundred dollars or upwards, or a bill increasing or diminishing the city revenue."

This defence not availing the party in the court below, the case is brought here by writ of error.

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McIndoe vs. City of St. Louis.

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The counsel for the plaintiff in error has discussed at length a variety of questions growing out of the character of defence which he proposed to make in the Circuit Court, and which he insists on here. His main position is, that the ordinance under which this purchase was made was an ordinance appropriating money to the amount of five hundred dollars and upwards, and that in effect it was a tax bill, and therefore required a majority of all the members of the Board of Aldermen to pass it; that inasmuch as the ordinance did not receive this majority, but only a majority of members present, it was void and gave no authority to the city officers to make the purchase which they did. From these facts, he infers that the city never accepted the deed, and therefore has no title.

We do not think it necessary to investigate these questions. This is an action of ejectment, and the question is, who has the legal title? The power of the city of St. Louis to take and hold real estate under its charter, is not denied. The city has shown a *prima facie* legal title—a deed from the former proprietor, whose title is not disputed. It is in vain to say that the city has not accepted the deed, when the very institution of this suit, and the presentation of the deed to the court and jury, on the part of the city, contradicts any such supposition. The only tendency of the facts given in evidence by the defendant, and the argument based on them, is to show a breach of the city charter by the city authorities in appropriating fifty thousand dollars to pay for the lot. What has this to do with the legal title? What propriety is there in investigating such questions in an action of ejectment? If Amade Valle had thought proper to convey this block of ground to the city of St. Louis, without any pecuniary consideration at all, we suppose such conveyance would invest the city with the legal title. Whether the consideration be one dollar or fifty thousand dollars, and whether the city has paid the consideration or can ever be compelled to pay it, are matters which do not concern this defendant, in his character of defendant to an action of ejectment. As a citizen of St. Louis, and a member of the corporation whose acts are alleged to be violatory of their charter, he can undoubtedly have these questions determined judicially, whenever he brings them before a court in such a shape as the law points out. They do not arise in this form of action. If the ordinance numbered 1494 had never had any existence, or be conceded to be a nullity, it would not divest the city of St. Louis of a legal title acquired by a legal conveyance; nor would the fact supposed prevent a legal title from vesting in the city.

The other Judges concurring, the judgment is affirmed.

*Cinnamond vs. Greenlee.*

CINNAMOND vs. GREENLEE.

1. Part owners of a steamboat are not partners but tenants in common.
2. One partner is a competent witness in an action brought by his copartner against a third partner for money advanced by the latter to the second as part of the capital of the latest, even during the partnership.
3. The money thus advanced constitutes no part of the partnership transactions.
4. On a settlement between partners, one may be a witness for another, against a third, for the amount to be paid by the last.

APPEAL from St. Louis Court of Common Pleas.

CROCKETT & BRIGGS, for *Appellant*, insist:

1. That Davis & Cinnamond, Greenlee & Logan, were part owners and tenants in common of the steamboat *Lighter*, and not partners. Colyer on Partnership, 666, 682, 688.

2. The plaintiff having paid, of his own money, debts incurred in the construction of the boat, which, under the terms of their original agreement, were to have been paid by the defendant, (who was also a part owner) may maintain assumpsit to recover it back. An action of law will lie even between partners for breach of the articles of association. Gow on Partnership, 70-1-2; 13 East., 7; 1 Nott & Mc., 20; 8 Mass., 462; 4 Bibb, 418.

3. That even as between partners, an action at law will lie to recover balance due upon settlement of partnership accounts: that in the case at bar, after the dissolution of the partnership, or, more properly speaking, after the severance of the tenancy in common, there was a full and final settlement of all their joint accounts, and the balance struck; upon which defendant expressly promised the plaintiff to pay the outstanding debts contracted in building. That having failed to pay these debts, and the plaintiff having paid them, may recover in assumpsit for the breach of the defendant's express promise.

4. That the instruction to the jury, at the instance of defendant, was erroneous, inasmuch as it virtually cuts off from the consideration of the jury all the proof touching the settlement of the joint account and the promise of the defendant to pay the outstanding debts of the boat.

5. That the instruction was irrelevant—wholly unsupported by proof, and calculated to mislead the jury.

6. That the witness, Davis, was improperly excluded by the court, and was a competent witness for the plaintiff—because,

First, He was not liable to the plaintiff for contribution. The debts of the boat paid by plaintiff, were not the debts of the witness, but the debts of the defendant. The witness had never agreed to pay them, and as between the part owners, could not be made liable for them.

Second. In case the plaintiff recovers, Davis will be entitled to no part of the fund, for the reason that plaintiff will only recover back his own money, which he has paid for defendant.

SPALDING & TIFFANY, for *Defendant*, insist:

1. On the bill of exceptions, no question can arise in this Court, as no point has been sufficiently



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*Cinnamond vs. Greenlee.*

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preserved, it not being stated that any decision of the court was excepted to; but at the close of a long bill of exceptions, it is alleged "*to which several opinions of the court the plaintiff excepts*;" and this bill of exceptions was filed long after the trial. 7 Mo. R., 209, Shelton vs. Ford & Whitehill; 8 Mo. R., 224, Vaulx vs. Campbell, ex'r.; 8 Mo. R., 656, Randolph vs. Alsey.

2. Even if an exception is properly taken to overruling a motion for new trial, the appellee contends that the motion was properly overruled—because,

First, The instruction was not excepted to at the trial. 8 Mo. R., 656, Randolph vs. Alsey.

Second. The exclusion of the deposition was not excepted to at the trial.

Third. The verdict was not against law; the instruction not having been excepted to, it is to be considered the law of the case by agreement, and the finding according to it is no grievance to the party.

Fourth. Nor was it against evidence. The Court will not interfere on this ground, unless it is a glaring case. 8 Mo. R., 434, Todd, *et al.* vs. Boone County; 8 Mo. R., 446, Wilson, *et al.* vs. Burks.

The deposition does not show that there was a final settlement, including the original transactions in building the boat. I mean the deposition of Lyons. That settlement included only the business done by the boat. This is the fair interpretation of that deposition. The court, then, would have done right in saying that there was no evidence of a settlement, including the transactions on which this suit is based.

*McBRIDE, J., delivered the opinion of the Court.*

David Cinnamond instituted his action of assumpsit in the Court of Common Pleas of St. Louis county, against Thomas Greenlee, and on making affidavit that the defendant was a non-resident of this State, an attachment was issued, and the steamboat Lighter, with her tackle, apparel and furniture, was attached as the property of said defendant.—The defendant pleaded non-assumpsit. A trial was had at the October term, 1844, when the plaintiff recovered judgment for \$236 99; whereupon the defendant moved for and obtained a new trial. The plaintiff then had leave to amend his declaration.

The amendment to the original declaration alleges as the cause of action, that on the 1st March, 1842, at Pittsburg, it was mutually agreed between the plaintiff and defendant, together with William Logan, John Davis, and George Bell, to construct a steamboat, which should belong to the parties in the following proportions, to-wit: The plaintiff and John Davis to own one-half, and Greenlee, the defendant, with Logan and Bell, to be the owners of the other half. The plaintiff and Davis were to furnish the engine and do all the blacksmith work necessary in the construction and equipment of the boat, whilst the defendant, with Logan and Bell, were to furnish all of the other materials and do all the other necessary work in the construction and equipment of the boat. It is averred that the plaintiff and Davis complied fully on their part with their undertaking and agreement, but that the defendants, Logan and Bell, did

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*Cinnamond vs. Greenlee.*

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not perform on their part; and by reason of such default, the plaintiff was compelled and did expend \$500, in and about the construction and equipment of the boat, &c. To this the defendant filed his plea of non-assumpsit, and a trial was again had, which resulted in a verdict and judgment for the defendant. The plaintiff thereupon filed his motion for a new trial, for the reasons, 1st, the verdict and judgment are against law; 2nd, they are against the evidence; 3rd, the court erred in excluding the deposition of John Davis from the jury; 4th, the court erred in the instruction given at the instance of the defendant's counsel; which was overruled, and an appeal taken to this Court.

The bill of exceptions sets out the deposition of John Davis, which was read to the jury, subject to all legal objection, after the close of the evidence, and was subsequently excluded by the court from the consideration of the jury, as follows: *John Davis*, of lawful age, &c., saith that the steamboat *Lighter* was built at Pittsburg in the winter of 1842, by George Bell, Thomas Greenlee, William Logan, John Davis and David Cinnamond; that John Davis and David Cinnamond were to own one-half of the said boat, in consideration of furnishing said boat with boilers, engine, and doing all of the blacksmithing of said boat; that said Bell, Greenlee and Logan were to own the remaining half, in consideration of furnishing all other materials and labor for the completion of said boat; that Bell, some time after the finishing of said boat, sold out his interest to said Greenlee and Logan; that on purchasing the said interest of Bell, said Greenlee and Logan became accountable for all debts contracted by said Bell as part owner of said boat; that afterwards, the said Cinnamond, Davis and Logan sold their three-fourths of said boat to Pierre Chouteau, Jr. & Co. of St. Louis, taking in part payment thereof said Chouteau & Co.'s three several notes, each for \$333 33, payable three months after the date thereof, provided that no claims came against said boat during the time to stop the payment of said notes. Deponent knows that James A. Speer, Henry Higbee, Andrew Miller and James McGunnegle, whose names appear in the annexed account, and marked A, had claims on the said steamboat *Lighter*, for work and labor done upon that part of said boat which was to be paid for by Bell, Greenlee and Logan; that Speer contracted to do the painting of said boat, and performed said contract; that Henry Higbee had a claim for queensware furnished to said boat; that Andrew Miller had a claim for furnishing blocks, tackle, &c., for said boat; and that James McGunnegle had a claim for furnishing coal to said boat. Deponent further states, that Greenlee and Logan gave their promissory note to said Bell in part payment of his interest; that said note

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was endorsed by Cinnamond and Davis, and transferred by Bell to one Blackburn, whose name appears in the account aforesaid; that P. Chouteau, Jr. & Co., aforesaid, were garnisheed by the above mentioned claimants; the sum of three hundred and thirty-three dollars and thirty-three cents being the amount of one of the three notes aforesaid, and in favor of David Cinnamond, was paid by Chouteau & Co. to J. B. Crockett, Esq., agent of the said Cinnamond, on condition that the said Cinnamond should pay off one-third of the aforesaid garnishments and costs, which was paid, to the best of deponent's knowledge and belief. Deponent has no interest whatever in this suit; and further he saith not.

The following is the account referred to in the above deposition:

<i>Thomas Greenlee,</i>				
<i>To David Cinnamond,</i>				<i>Dr.</i>
To cash paid James A. Speer for you,	-	-	-	\$96 60
do. O. Blackburn	"	-	-	49 00
do. Henry Higbee	"	-	-	21 41
do. Andrew Miller	"	-	-	30 21
do. James McGunnele	-	-	-	5 85
do. P. Chouteau & Co.	-	-	-	21 55

St. Louis, 14 Nov., 1843.

\$224 62

*Thomas Lyon* testified, that he is acquainted with the parties, Cinnamond and Greenlee; he was employed as clerk of the steamboat Lighter by John Davis and Thomas Greenlee, two of the owners, with the consent of the other owners, some time during the summer of 1842; the boat was owned by John Davis, Thomas Greenlee, David Cinnamond, and William Logan. While I was on the boat, George Bell was not a part owner, as he had previously sold to Greenlee and Logan. David Cinnamond owned one-fourth part of the boat. Witness took charge of the boat as captain in March, 1843, and continued to run her until the sale to Chouteau & Co., in April, 1843. After the sale of the boat, the owners, to-wit: John Davis, David Cinnamond, Thomas Greenlee and William Logan, met, with witness, at the house of Thomas Greenlee in the city of Pittsburg, where a settlement was had between the owners, which included the business of the boat from the time witness went on board till the time of settlement. It was a final settlement between the owners. There was found to be due to D. Cinnamond a balance from Greenlee and Logan—the amount not recollected—which they promised to pay. Greenlee and Logan were to pay the outstanding debts for the building and outfit for their half of the boat. This I learned in my intercourse

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with the owners, and my knowledge of the business of the boat. While in the employ of the owners, and whilst captain and clerk of the boat, I had control of the books and understood the business of the boat. The dividends arising from the business of the boat were applied to the payment of the debts for the construction of the boat and its outfit. These dividends were the dividends of the owners, and not merely those of Greenlee and Logan. Greenlee and Logan were to refund to Davis and Cinnamond the amount of their dividends made use of for the payment of those outstanding debts for the building and construction of the boat.

The evidence of Mr. Crockett goes to establish the payment by Cinnamond of the demands referred to by Davis, as debts which should have been paid by the defendant.

After the exclusion of Davis' evidence from the jury, the defendant obtained from the court the following instruction to the jury: "If the jury believe from the evidence that the plaintiff and defendant were, with others, part owners of the steamboat Lighter, and that the cause of action sued for in this suit grew out of the building and business of said boat while they were such joint owners, they are bound to find for the defendant."

Two questions for the decision of this Court are raised by the record: first, was the evidence of Davis properly excluded from the consideration of the jury; and, second, did the court correctly instruct the jury? They may be considered together.

The relation existing between the part owners of a boat is not that of partners, but tenants in common. But if it were otherwise, still it is not perceived upon what ground the court excluded the evidence of Davis. One partner would be a competent witness by whom to prove that a second partner had advanced money for a third, as part of his portion of the capital stock of the partnership concern; and such second partner would have a right *at law* to recover the amount thus advanced for the third partner, even during the existence of the partnership. Such a transaction does not enter into and form a part of the partnership business, so as to require the interposition of a court of equity to adjust and settle the rights of the several partners. A balance found due on a settlement between partners, even though that balance be a part of the profits or loss of the partnership dealings, may be recovered at law, as readily as if the balance arose out of the ordinary traffic between strangers. The settlement withdraws from the partnership all of the transactions embraced in it, and from partnership, converts the rights and liabilities into individual. The partnership is dissolved, so far as the mat-

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*Steamboat Raritan vs. Pollard.*


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ters embraced in the settlement are concerned, and as between the partners themselves.

If part owners of a boat be tenants in common, it is indisputable that one may be a witness for another, in an action against a third; for, whatever may be the result of the action, it will not affect his interest. He will not thereby acquire any rights, nor be subject to any losses; so that he stands indifferent, not only between the parties litigant, but as to the result of the controversy.

Wherefore, we are of opinion that the court committed error in excluding the evidence of Davis from the jury, and that the court erred in the instruction given.

The judgment is reversed and the cause remanded.

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 STEAMBOAT RARITAN vs. POLLARD.

The lien given by our statute to certain claims against a steamboat, does not extend to claims arising out of this State against boats not engaged in navigating the waters of this State, so as to attach on the arrival of such boats in this State.

### APPEAL from the St. Louis Court of Common Pleas.

#### CROCKETT & BRIGGS, *for Appellant, insist:*

That the verdict was against law and the evidence; that the instructions asked for, on the part of the boat were improperly refused; and that a new trial should have been granted.

#### SPALDING & TIFFANY, *for Appellee, insist:*

1st. The court did not err in refusing the instructions asked by defendant. They are both based upon the assumption, that a cause of action that accrued beyond the limits of the State of Missouri, is not embraced in our acts giving liens on boats and vessels. The converse of that proposition is maintained by the appellee, to wit:

*That any cause of action enumerated in the acts of March 19, 1835, entitled, "An act to provide for the collection of demands against boats and vessels," and of February 12, 1839, supplementary to the foregoing, is a lien on boats, notwithstanding it may have accrued out of the State of Missouri. Rev. Code of 1835, p. 102; Acts of 1838-9, p. 13; Story's Conflict of Laws, p. 233, sec. 280; p. 246, sec. 296; p. 267-8, sec. 322; p. 335-6, sec. 402; 8 Mart. Rep., 95, was of a lien of vendor*



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*Steamboat Raritan vs. Pollard.*

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according to laws of Louisiana, which vendor lived in England, and by the laws there, the claim was no lien. 5 Mo. Rep. 256; Conflict of Laws, p. 467, sec. 556; p. 477, sec. 571; p. 481-2, sec. 575.

The principles deduced from these authorities, are,

1st. By the act of 1835, the boat was made a *quasi corporation* for the purposes of suit, under that act, by foreigners as well as citizens, on the general doctrine which is true without exception, that all remedies for the collection of debts, are open alike to strangers and citizens, where the local law makes no distinction or limitation in terms.

2nd. The act of 12th Feb., 1839, is the first act creating liens at all, and that act makes all the causes of action suable under the former act, liens; so that, if a cause of action accrued out of this State, could be prosecuted under the first act, it was made a lien by the terms of the second act.

3rd. That where the cause of action accrued abroad, we are, in the absence of proof, to presume it to be a lien, throwing the burdens on the defendant, the boat, to show that it was not a lien where it accrued.

2nd. Public policy requires such a construction of these acts, as will give liens to the enumerated claims, which have accrued out of the State of Missouri.

1st. The States are not foreign nations, and nearly every boat, navigating these rivers, runs through different States and jurisdictions every trip.

2nd. The difficulty and confusion of a contrary doctrine, would be immense, as it would lead to apportioning contracts and wages, so as to ascertain what part would be recoverable here, and what accrued without the State.

3rd. It makes an unreasonable and unconstitutional distinction between our own citizens and those of our sister States. Constitution of U. States, art. 4, sec. 2.

3rd. The true mode of considering this matter, is that our statutes create a remedy, and it is well settled that when a suit is brought, the right is enforced, according to the remedy of the place where suit is brought. The remedy here, in Missouri, on such demands against boats, is the arrest of the boats by name, and subjecting them to sale, and application of the proceeds in a certain order. It is like the case of insolvency or administration here, where the fund would be distributed according to our laws, and not according to the laws elsewhere. The boat liens are made such, for the purposes of the suit, are a part of the remedy, and of course have no effect elsewhere, if accrued out of this State.

4th. A lien is not always created by contract, nor is it always based on contract; witness the liens for torts in our act, which shows that all the liens there created, are made such by the statute, *proprio vigore*, and not in any other way.

5th. As to contract with Pollard. It is too late to demurr, because it is not set out in the complaint; and it does not prevent the lien's attaching. It is no security to Pollard. McCloy would have been bound if that contract had not been made.

6th. Damages found are not too large.

SCOTT, J., delivered the opinion of the Court.

This was a proceeding against the steamboat Raritan, by the appellee Pollard, for services rendered said boat, as clerk. Pollard obtained judgment, from which the boat appealed.

There was evidence given tending to show, that services were rendered by Pollard as clerk, and the duration and value of those services. It appeared that the boat, during the time the services were performed, was employed in navigating the Ohio river; and the question in the cause is, whether a proceeding *in rem*, will lie against a boat not engaged in

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*Steamboat Raritan vs. Pollard.*

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navigating the waters of this State, there being no evidence that a lien is given, or that such a proceeding is allowable by the laws of the State in which the contract was made and the services were rendered.

It is an unquestionable principle, that the law of the place in which suit is brought on a contract, must determine the remedy to be pursued, in order to enforce it. We have a general remedy open to all, for an enforcement of contracts. Commercial considerations have induced the General Assembly, to give an additional remedy to those having demands of a particular character against steamboats navigating the waters of this State. It is not seen on what principle we can extend this remedy to contracts not made in this State, and to vessels not employed in our navigable waters. If the law of the place of contract did not give the remedy, to give it here to a single creditor, would be unjust to other creditors, as they might thereby be deprived of the means of obtaining satisfaction of their demands. *Steamboat Rover vs. Stiles*, 5 Black., 483.

We cannot take judicial notice of laws of other States. The existence of those laws, is a matter of fact, and is to be proved like other facts.— We presume that upon common law questions, the common law of a sister State, is similar to that of our own, and when there is not proof of the foreign law, regulating the subject of controversy, our courts must necessarily be governed by our own law. But he who seeks to obtain an advantage or claims a right under a foreign law, in suits in our courts, must show the existence of that law. It cannot surely be necessary for him who defends, to show that there is no such law. These are obvious principles and need no authorities to sustain them.

There is no force in the objection, that a denial of the remedy in case of contracts made out of the State, would lead to their apportionment, as the vessel in the same voyage, might be used partly in the waters of this State, and partly in those of another. Where a contract is made with those navigating the waters of this State, it would be no reason for denying the remedy against a vessel, that in the same voyage, she was employed on waters not within this State. Although so employed, she would not the less be a boat navigating the waters of this State. If the adoption of this course by the court, deprived a party of all remedy, we might pause before we could give it our sanction, but as he has clearly another remedy and as it might be productive of great hardship to subject a vessel to this remedy, accidentally found in our ports, in the absence of most of those who may be interested in her, we feel ourselves compelled to deny the remedy under the circumstances of this case.

*Steamboat Time vs. Parmlee.*

This matter may be viewed in another light. Our law, as it were, personifies a steamboat. For particular purposes, and under particular circumstances, it gives it the capacity to contract debts and subjects it as a person to suits for the recovery of those debts. As the instances and circumstances under which this may be done, are enumerated, on what principle can we enlarge the capacity of the boat, and extend it to a state of circumstances not warranted by the law? The occurrence of cases of this kind, was so probable, that it could not have been overlooked by the General Assembly, and the omission to extend the remedy to them, must have been intentional.

The other Judges concurring, the judgment will be reversed.

## STEAMBOAT TIME vs. PARMLEE.

## APPEAL from St. Louis Court of Common Pleas.

*SPALDING, for Appellant, insists :*

In this case the only question is, whether a demand against a steamboat, that accrued entirely in the State of Kentucky, being a sale of supplies to the boat at Louisville by residents there, is a lien on the boat under the laws of Missouri, to be enforced by a suit against the boat by name, here. The appellant sustains the negative, and refers to the *Raritan* cases argued at this term, and the briefs and arguments therein.

*HAMILTON, for Appellee.*

This case is intended to present the question, whether or not a creditor residing out of this State, can arrest a boat here, used in navigating the waters of this State, upon a claim for supplies furnished for her use, at Louisville, Kentucky, within six months before suit brought. The appellee holds the affirmative of this question, and refers to the points and authorities in the case of the steamboat *Raritan* vs. *Pollard*, argued at this term.

*SCOTT, J., delivered the opinion of the Court.*

This was a proceeding under the statute concerning boats and vessels, against the steamboat *Time*, the appellant. There was a judgment for the plaintiff, from which the defendant appealed.

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*Ellenmann, et al. vs. Thompson.*

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The suit was to recover supplies furnished the boat, at Louisville in Kentucky. The owners of the boat did not reside in this State, and she was built at Louisville. This case then comes within the principle of that of the steamboat *Raritan vs. Pollard*, decided at this term of the Court, and raises the same question.

The other Judges concurring, the judgment will be reversed.

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ELLENMANN, ET AL. VS. THOMPSON.

A deed purporting to convey the real estate of the wife—in which the husband only joins as a party assenting to the conveyance by his wife—will not convey the interest of the husband in such real estate.

APPEAL from St. Louis Circuit Court.

*FIELD, for Appellants, insists:*

The only question involved in the case, is whether the deed of 30th of May, 1842, was effectual to pass the life estate of John Boschenstein, in the lot in question; if it was so, then nothing remained to pass under the execution sale of the plaintiff below, and the plaintiff was not entitled to recover.

For the purposes of the present hearing, it will be admitted that the deed was informally executed to pass the estate of the wife. Nevertheless it may be good against the husband, John Boschenstein. *Bryan vs. Wear*, 4 Mo. Rep., 106.

The appellants insist that the deed was effectual, to pass the estate of John Boschenstein.

1st. He was a granting party.

1. By express words. The deed is made by "parties of the first part." These words cannot be satisfied, without considering J. B., one of those parties. In a subsequent part of the deed, J. B. is expressly named "party of the first part." A fair grammatical construction of the first clause of the deed, leads to the same conclusion. The deed is made *by* and between Emma, &c., and *by* and with the consent of John &c.

2. By the manifest intentions of the parties,

It was a security for a debt, contemplating a disposition by sale of the land, and authorizing the trustee to give to the purchaser a deed of the fee. It cannot be supposed that the parties intended to leave outstanding, a life estate in the husband.

Lord Hobart says, "Judges should be curious and subtle, *astute* to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." *Hobart's Rep.*, 277, b.

2nd. If the deed were construed merely as a grant by the wife, and an assent to that grant by the husband, still the deed is effectual to pass the estate of the husband by way of confirmation!

It is material to observe, that the deed purports to dispose of the fee, which includes the hus

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band's life estate. Coke says, "there be more words than *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*; also, if a man makes a lease to A, for years, and after by his deed the lessor *voluit quod haberet et teneret terram pro termino vite sue*; this is adjudged by this verb *vol*o to be a good confirmation for term of his life." 2 Co. Litt., (Thomas Ed.,) p. 611. Shephards Touchstone, title Confirmation. In the case at bar the word *consent* is used, which is still more expressive than the word *vol*o. Coke afterwards says, that a "confirmation is but a mere *assent* by deed to the grant." 2 Co. Litt., (Tho. Ed.,) 617.

It has been objected that the wife's deed is a nullity and incapable of confirmation. It will be observed however, that the confirmation is only claimed to extend to the estate of the husband, and in this respect, the deed of the wife, is just as capable of confirmation as that of a stranger. See Bredon's case, 1 Coke's Rep., 191.

3rd. Another construction may put on the deed leading to the same result. The wife, in disposing of the husband's life estate, may be regarded as the attorney of the husband, and he in expressing his assent, and making the deed effectually, constituted her his attorney, to dispose of his estate, and to do it in the manner in which it was done.

The phraseology of the instruction given by the court below, is open to criticism, but the counsel for appellants passes this by, as unimportant to a just decision of this case.

#### *Todd, for Appellee, insists:*

1st. John Boschenstein is not a granting party to the deed of trust to Michael Tesson; given in evidence. He is merely introduced and mentioned in the premises as the husband of Emma, for the purpose of her having his assent to her act in the premises. It is so expressed in the deed.—Also as evidence thereof, the deed shows that it was for her account and benefit; the debt to be secured being hers. To ascertain who are the grantors in a deed, we are first to look into the premises of the deed to see who are therein expressed to be the parties. 4 Cruise Dig., p. 26 and 27. Next at the apparent interest of the parties, looking through the whole deed. And in case of doubt, arising from ambiguous language, we should be governed by the intention of the parties. Sec. 1, Chap. 19, of 4 Cruise Dig.

In this case six things are conclusive, that Boschenstein is not and was not intended to be a grantor.

1. Because the language of the deed expressly states him to be otherwise at the outset.
2. Because the object of the deed, was to secure an indebtedness of his wife.
3. Because for that purpose, she had something in the land to convey, to wit: the fee.
4. Because it was a sufficient compliance with the law, to enable her to convey her fee, that her husband should be in the deed as simply a consenting party, the object of the law being her protection only, and requiring the same in cases where he has no interest, or estate, as when the fee is in his wife, for her sole benefit, &c., or the husband has before disposed of his interest, either by a voluntary sale or sale under execution.

5. The condition of the deed provides that "if the said *party* of the first part, shall well and truly pay, &c.; if not then sell, &c.," and the balance pay over to said *party* of the first part.—That Emma is here intended as the "*party* of the first part," is evident because it is her debt, secured by her means, and therefore if sold to pay the debt with, to her, of course, the balance, if any, should be paid.

6. This deed being an Indenture, the words thereof are to be considered the words of both parties. Sec. 17 of said chap. 19, of 4 Cruiss.

2nd. If John Boschenstein is a grantor, then the deed is in law void as against Thompson, because it amounts to a voluntary conveyance of his interest to or for the benefit of his wife Emma, and the evidence shows, that at that time he was insolvent, (having applied for the benefit of the



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late U. S. Bankrupt act within sixty days thereafter,) and then owed Thompson the debt for which said judgment was obtained.

3rd. The deed to Le Duc by the assignee in Bankruptcy of Boschenstein, does not help his title as against Thompson, because Thompson obtained his judgment before Boschenstein filed his petition for the benefit of said Bankrupt act, and therefore the lien of his said judgment, upon the life estate of Boschenstein in said lot, was saved, as provided for in sec. 2nd of said Bankrupt act, which section also declares the deed, "utterly void," it being made within two months before petition filed, if made "in contemplation of Bankruptcy," which has been adjudged to mean a known state of insolvency. 5 vol. Law Reporter, p. 296; 6 do., p. 265, 302-18.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of ejectment brought by Thomson against Ellenmann and others, to recover possession of a lot of ground in St. Louis. The plaintiff obtained a judgment. The facts were agreed upon at the trial and submitted to the court. They were as follows:

On the 30th May, 1842, the legal title to the premises, was in Emma Boschenstein, then and still the wife of John Boschenstein. On the 14th July, 1842, a judgment was recovered against John Boschenstein by F. W. & J. Thompson, for \$215 47. On the 15th July, 1842, a writ of *fi. fa.* was issued on said judgment and returned *nulla bona*. On the seventeenth March, 1845, a second writ issued, which, on 7th of April, 1845, was levied on the premises in controversy, and on the 28th April, 1845, the land levied on was sold by the sheriff to the plaintiff. The sheriff made a deed according to law, conveying all the interest of said John Boschenstein to the plaintiff. On the 30th of May, 1842, a deed was made by Emma Boschenstein, by her attorney Ferdinand Boschenstein, conveying this land in trust to Joseph LeDuc, for certain purposes therein mentioned. This deed purports to be made and entered into "between Emma Boschenstein, wife of John Boschenstein, by and through her attorney in fact, Ferdinand Boschenstein, and by and with the consent of the said John Boschenstein husband of said Emma," and certain other parties named therein of the second and third part. The parties of the first part by these presents "grant, sell, alien, enfeoff, convey and confirm" to the party of the second part, an undivided half of a certain lot of ground in St. Louis, describing it, it being the premises sued for. In subsequent clauses of the deed, the *party* of the first part is spoken of, and in other clauses, the words used are, *parties* of the first part.— This deed was signed and sealed by Emma Boschenstein, by her attorney in fact Ferdinand Boschenstein, and John Boschenstein and M. Tesson. The justice of the peace before whom the deed was acknowledged, certifies that Ferdinand Boschenstein, the attorney in fact of Emma Boschenstein and John Boschenstein, who were both personally known to him,

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&c., severally acknowledged the deed, &c. This deed was admitted to be *bona fide*, and that before the sale by the sheriff, as aforesaid, the trust of the said deed was executed by a sale of said land and a conveyance to Joseph LeDuc; that the proceedings of said trustee were regular and formal, and that the defendants hold the premises under LeDuc. The power of attorney, under which Ferdinand Boschenstein purported to act, was acknowledged by Emma Boschenstein before a justice of the peace.

The Circuit Court being of opinion, that this deed did not pass the interest of John Boschenstein, in the land conveyed, gave judgment for the plaintiff, and from this judgment the defendants have appealed.

We think, with the Circuit Court, that this conveyance is insufficient to pass the life estate of John Boschenstein. It is quite manifest, that the deed has been drawn under an entire misapprehension of our laws regulating conveyances. It does not purport to be a conveyance of any estate or interest of the husband, but seems to have been designed to pass the estate of the wife, and the conveyancer appears to have thought the husband's assent necessary. His name is therefore mentioned in the deed, not as a party conveying, but as assenting to the conveyance of his wife. It is true that in a subsequent clause of the deed, the words "parties of the first part," are used, which might embrace the husband as well as the wife; but then in other clauses of the instrument, the "party of the first part" is spoken of, in the singular number, and it is difficult, under these circumstances, to draw any inference as to intention. We do not feel authorized by any thing in the language of the deed, to infer that the husband either knew that he had any interest in this land, or designed to convey it, if he was aware of his rights. The debt, to secure which the deed was given, was a debt of the wife, and the title to the land was in the wife. An attempt to convey this land is made by the wife, through a power of attorney, (which is not on the record,) without joining with her husband and without any privy examination, and her husband's name is signed to the deed, and when mentioned in the body of the instrument, he is spoken of, not as a party conveying, but as assenting to the conveyance of his wife. The bare statement of such a deed, must be sufficient to show, that it has been drawn by some one unacquainted with our forms of conveyancing, and not apprised of the requisites in a deed to pass the estate of a *feme covert*.

Judgment affirmed.

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*Austin vs. the State.*

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## AUSTIN vs. THE STATE.

1. It is in the power of the State Legislatures, unless restrained by some provision in their State Constitution, to prohibit or to restrict the exercise of any trade or business within such State.
2. No such prohibitory clause is contained in the Constitution of this State.
3. The sale of intoxicating liquors is by law illegal—is not a privilege of a citizen of this or any other State. The right to sell can only be acquired by complying with the law.
4. Citizens of other States are not by the Constitution of the United States entitled to the political and municipal rights and privileges of citizens of this State.
5. The County Court has the exclusive right to determine whether a license to keep a dram-shop or grocery shall be granted.
6. A license to keep a dram-shop granted by the city of St. Louis does not dispense with the necessity to procure a license from the County Court.
7. It is not necessary to allege in what character or capacity the defendant sold. It is sufficient to set out the sale without license.

## APPEAL from St. Louis Criminal Court.

LESLIE, *for Appellant.*

STRINGFELLOW, *Attorney General, for the State.*

NAPTON, J., *delivered the opinion of the Court.*

This was an indictment for selling spirituous liquors, in quantities less than one quart, without license. The indictment charged that the defendant, at, &c., on, &c., did unlawfully carry on the trade and business of a dram-shop keeper, and that he did then and there unlawfully sell intoxicating liquors in a quantity less than a quart, without having any license therefor, contrary, &c. The defendant appeared, and pleaded, 1st, that he had never resided in the State of Missouri for the space of two years before the finding of the indictment; 2nd, that he was a natural born citizen of the United States, and had never resided in this State for two years before the finding of this indictment; 3rd, that he is a natural born citizen, &c., and never resided in this State, &c., and that he

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made application to the County Court of the county of St. Louis for a license to carry on the business of a dram-shop keeper, and had complied with all the requirements of the law in such case made, but that the said court refused to grant him said license; 4th, that he was duly and legally licensed to keep the dram-shop in the said indictment mentioned, by the City of St. Louis, by virtue of a certain ordinance recited in the plea.

The Circuit Attorney filed a demurrer to these pleas, which the Criminal Court sustained. The defendant was found guilty, and fined. The defendant moved in arrest of judgment, because of the deficiency of the indictment. This motion was overruled.

The first two pleas, we understand, are designed to call in question the constitutionality of an act passed by our Legislature, in 1843, (see Rev. Code of 1845, app. p. 1099) restricting the County Court of St. Louis county, in granting dram-shop licenses, to persons who have resided for two years in the State and three months in the county. We do not see very clearly how these pleas would furnish any defence to the indictment, if it were conceded that this law was unconstitutional, unless we further admit that the business of dram selling is an occupation which the Legislature either have no power to prohibit or have failed to place under any legal and constitutional restrictions. Passing by these questions, however, for the present, we have no hesitation in acknowledging our inability to see any conflict between the act of the Legislature alluded to and the constitution of the United States. The second section of the fourth article is the clause relied on as conflicting with the statute. That section declares, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. This provision was taken from the old articles of confederation and seems to have encountered no opposition or discussion in the convention where it was framed, or in those to whose deliberations the constitution was subsequently submitted. Nor has it given occasion to any of those judicial interpretations which so many other clauses in the same instrument, affecting the rights of the States or the power of the Federal Government, have from time to time elicited. In *Abbott vs. Bayley*, (6 Pick. R., 89) Chief Justice Parker incidentally alludes to this clause of the constitution, and seems to think it very manifest that it is to be understood in a qualified sense. It was merely designed to declare that the citizens of the different States should not be aliens to each other, but that they might take and hold real estate without the necessity of becoming naturalized, and eventually enjoy the full rights of citizenship, by complying with the laws of the State to which they may transfer their residence. It was not

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intended to prevent the States from requiring such length of residence for the enjoyment of political or municipal rights as they might deem conducive to their welfare. The whole history of State legislation shows that the interpretation of this clause in the Federal Constitution, which has been contended for at the bar, does not embrace the sense in which it has been generally understood. There is scarcely a State, we apprehend, which has not thought proper to require some length of residence as requisite to the exercise of political and municipal rights by emigrants from the sister States. It is true, that in point of practice, few of the States have thought it advisable to place any restrictions upon the learned professions or upon any class of industrial pursuits. But it is equally true, that the State Legislatures have the power, unless there be something in their own constitutions to prohibit it, of entirely abolishing or placing under restrictions any trade or profession which they may think expedient. Can there be any doubt that the Legislature of Missouri might declare the practice of law or medicine an unlawful calling, if they thought fit so to do; or that the professors of these sciences should have certain qualifications, of age, length of residence, moral character, &c., which in their wisdom might seem proper? Of course we will not be understood as extending these remarks beyond the particular clause of the Federal Constitution of which we are now speaking. There may be other clauses in that instrument—and there certainly are provisions in all our State constitutions, which will not permit legislative bodies wantonly to interfere with or destroy many of the natural or conventional rights of the citizens. Of this class, are those provisions which secure the freedom of the press and of speech, and the freedom of debate. But we are not aware that there is any provision in our constitution which would prevent the Legislature from prohibiting dram selling entirely; nor have the Legislature been prevented from placing such restrictions upon this business as they may think fit. They have exercised this power, not of prohibiting, but of restricting it. They have virtually declared that selling spirituous liquors in quantities less than one quart is illegal, and subjects the seller to heavy penalties, unless he has taken the steps required by the law. To sell drams without a license, is not a privilege which either our citizens or strangers can enjoy in this State. The Legislature has probably regarded this business as one which should receive no encouragement, because of its tendency to deprave the public morals. Believing it most expedient to restrict, rather than to attempt its entire abolishment, they therefore made it a source of revenue. But the act concerning groceries and dram-shops is not a mere revenue law, any



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more than the act concerning attornies and counsellors at law could now be regarded as a revenue law, since the act of 1846-'7 has made the practice of law a source of State revenue. The act concerning dram-shops prohibits the selling of drams without a license duly obtained, and requires certain qualifications in the persons to whom licenses may be granted. Whenever the Legislature prohibits any calling or profession, it ceases to be a lawful pursuit; and when the Legislature do not prohibit it, but allow it to be exercised by certain persons, having certain qualifications specified in the law, it then becomes a municipal privilege, which may be only exercised by those persons who have the qualifications, and pursue the steps required by the law. It would be strange indeed, that the moment a citizen of another State sets his foot on our soil, he is to be considered as entitled to all the political and municipal privileges enjoyed by our own citizens, without regard to the constitution and laws of this State. And yet the words of the Federal Constitution are without qualification. If we agree to exclude political privileges from the number of privileges and immunities which the constitution of the United States declares citizens of other States shall be entitled to, there is the same reason for extending the limitation to municipal privileges.— And selling spirituous liquors in quantities less than one quart, is in this State a *privilege* granted only to those having the qualifications pointed out in the act. A residence of two years in the State, is one of the qualifications which the Legislature have thought proper to require in the city of St. Louis; and this qualification, we consider, is no more liable to constitutional objections than a residence of one year before a citizen from another State is allowed to vote, or a residence of five years before he can be elected to the Legislature.

The third plea sets up as a defence that the County Court refused the defendant a license, notwithstanding he possessed every qualification required by the act. The plea also admits that the applicant had not been in the State for two years. Of course the plea is framed upon the hypothesis that the residence of two years in this State is an unconstitutional requisite, and this question having already been disposed of, the other grounds of defence insisted upon might be passed over without observation. But as the question arises in another case, we may as well dispose of it here. The act concerning groceries and dram-shops requires applications for licenses to be made to the County Court, and authorizes this tribunal, where it is of opinion that the applicant is a person of good character, to grant him a license. The court is to decide upon his qualifications. The Legislature have entrusted this court, and not any other

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body, with the power of determining to whom licenses shall be granted. If the court improperly refuse to grant a license, this will not authorize the applicant to vend liquors without a license. If it were imperative upon the County Court to grant a license, whenever a suitable state of facts is made out, then the proper course to procure a license would be a *mandamus* from some other judicial tribunal having a superintending control over the County Court. It is certainly no excuse for the vendor of spirituous liquors without license, that the County Court have refused or failed to do their duty.

The fourth plea sets up a license from the city authorities. The ordinances of the city are subordinate to the laws of the State, and a license from the County Court is required by the laws of the State. The city license does not dispense with the necessity of a license from the State authorities.

The motion in arrest of judgment brings up the sufficiency of the indictment, which is the only question remaining.

The indictment is said to be defective, because it does not allege that the defendant sold the liquors in the character or capacity of a dram-shop keeper. It does not matter in what capacity the defendant sold, if the sales have been without license. If the want of a license generally is averred in the indictment, that is sufficient; and if the defendant claims any special exemptions, he may show them. When the cases of the State vs. Brown, the State vs. Schlick, &c., (8 Mo. R., 210) were determined, both the act concerning groceries and dram-shops and the act concerning inns and taverns were in force, and authorized a sale of liquors in quantities less than a quart under either license. There was undoubtedly great confusion growing out of such apparently inconsistent and contradictory provisions; but seeing that the act concerning groceries and dram-shops expressly and in terms recognized the existence of the other law, the court found it necessary to reconcile the provisions of the two laws, and this could only be done by considering a license under either law as authorizing the sale of liquors in small quantities. Those expressions in either law which by themselves would seem to have contemplated a license under one of them as alone sufficient to protect the vendor of spirituous liquors, were therefore necessarily to be understood in a limited and qualified sense. The law concerning inns and taverns was thought to be still in force when the revision of 1845 was published, as we find it still retained in that volume. Whatever propriety there may have been in so considering it, the act of the last session of the Legislature (Feb. 16, 1847) appears to sanction that idea, and it

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would be useless now to examine the question. The case stands, then, as it did in 1835, and the cases of the State vs. Hans, &c., decided that the negation of a license generally was sufficient.

I take this occasion to disclaim the opinions imputed to this Court by the head notes to the above cited cases. There is not a word in the opinion which gives any color to the inference which seems to have been drawn from it, that *because* an indictment adopted the words of the statute creating the offence, it was *therefore* bad. No lawyer ever imagined that an indictment was vitiated by pursuing the language of the statute, nor am I aware that it has ever been held, by this or any other court, that *every* indictment is good *solely* because it uses the words of the act which describes the offence. Such a description by the pleader is in some cases sufficient, and never vitiates, but, in many instances, is far from making a good indictment. Where the offence, though described by the statute in general terms, requires the concurrence of some person other than the offender to render it complete, the name of such person must be given in the indictment; or, where the name is unknown, it must be so stated. The laws concerning ferries, clock pedlars, merchants, and others, whose occupations require a license, describes offences against their provisions in general terms, but it has been uniformly held that the indictments under them must specify some act or acts in violation of law, and that mere general charges in the words of the law will not suffice.

This disavowal of entertaining any such views as have been attributed to this Court by the head notes to those cases, is rendered necessary by the last objection which the plaintiff in error makes to the sufficiency of this indictment. That objection is, that the indictment does not allege any particular act of sale, nor to whom the sale was made. This objection is undoubtedly valid, if any regard be paid to precedent. The indictment should state the person or persons to whom drams have been sold; or, if the names of the persons be unknown to the grand jurors, it should be so stated. This has been the approved form of such indictments heretofore, and no authority or reason, of which we are apprised, warrants a departure from such form. It is not for us to say, that such allegations are useless; that they seldom impart to the defendant any information which he has not previously. The principle upon which such allegations have been originally introduced, is a sound one, and, in some offences of this class, might be of great importance to the defendant.— In this particular offence, we may be unable to see any particular benefit to be derived from it, but we have no authority for dispensing with it on that account.

The other Judges concurring, the judgment is reversed.

*Reyburn, adm'r., &c. vs. Belotti & Guger.*

REYBURN, ADM'R., &C. vs. BELOTTI & GUGERI.

A witness may acquire such knowledge of a person's hand writing as to authorize him to testify to his signature, by having seen his letters on business with a firm of which witness was clerk, and finding that he acted upon and recognised the letters.

SCOTT, J., dissenting.

ERROR to St. Louis Circuit Court.

*TOWNSEND, for Plaintiff in error, insists :*

- 1st. The court erred in overruling the demurrer to the replications.
- 2nd. The evidence of Fontana's hand writing, was incompetent.
- 3rd. It was insufficient to entitle the bill of exchange to be read to the jury.
- 4th. The second instruction to the jury, asked by the defendant, ought to have been given.
- 5th. There was no evidence before the jury, from which they could legally find the issues joined upon the two replications to the second plea, and the issue joined upon the replication to the fifth plea, for the plaintiffs.

*SHEPLEY, for Defendant in error, insists :*

- 1st. The decision of the Circuit Court was correct, in overruling the demurrer to the plaintiffs' replications.
- 2nd. It is maintained that the court below, was correct in admitting Fontana's acceptance to be read in evidence.
- 3rd. The court below was correct in refusing the instruction prayed for by the defendant.

*McBRIDE, J., delivered the opinion of the Court.*

Belotti and Guger brought an action of assumpsit against Reyburn, adm'r. of Felix Fontana, dec'd., in the Circuit Court of St. Louis county. The declaration contained three counts; the first upon a bill of exchange drawn by the plaintiffs on the defendants intestate, dated at Falmouth, Oct. 16, 1824, payable six months after date, and accepted by him; the second count was for work and labor, &c., done and performed, goods, wares and merchandise sold, for money paid, laid out and expended, and lent and advanced to him; the third count was upon an account stated.

The defendant below, pleaded *non-assumpsit* to the whole declaration. 2nd. plea to the first count *non-assumpsit* within ten years. To the second count, 1st, as to the goods, wares and merchandise, *non-assumpsit* within two years, and as to the remainder of the count for work, &c.,

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*Reyburn, adm'r., &c. vs. Belotti & Gugerl.*

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*non-assumpsit* within five years. To the third count, 1st. *non-assumpsit* within five years, and that the demands were not exhibited against the administrator for allowance within three years next after granting of letters of administration.

The plaintiff filed a similitur to the general plea of *non-assumpsit* and replied to the second plea, alleging "absence from the United States," and "beyond seas," as an excuse for not bringing his action within ten years after the same accrued. To the pleas to the second count, the plaintiff replied, 1. That their cause of action accrued prior to the passage of the act of the General Assembly of this State, prescribing the time of commencing actions, approved 16th March, 1835, and that the plaintiffs were at the time, and have continued up to the time of commencing this suit beyond seas, to wit: at London, &c. 2. The demand accrued prior to the passage of the before recited act, and that the plaintiff was absent from the United States, &c. The replications to the pleas to the third count, were similar to the two last to the second count; and a further replication, that at the time of the granting of the letters of administration, and ever since, the plaintiffs were absent from the United States, &c.

The defendant rejoined; when the cause was submitted to the jury, who found for the plaintiffs upon all of the issues, and assessed their damages. The defendant then filed his motion to set aside the verdict and for a new trial, for the reason that the verdict was against law, against evidence, against the weight of evidence and against law and evidence; because the court admitted illegal evidence, misdirected the jury and refused legal instructions asked for by the defendant. The motion was overruled and exceptions taken.

The bill of exceptions sets out the evidence given upon the trial. The deposition of *Charles William Gwyn*, a witness for the plaintiffs, which was taken on the 2nd Sept., 1844, when the deponent was between thirty-one and thirty-two years of age, who states that he had been in the employment of the plaintiffs, who resided in the City of London, and who are baromettèr and looking-glass manufacturers, from the age of twelve years, and during the time of such employment, he had been well acquainted with the affairs of the firm of Belotti and Gugerl; that the firm was changed in the year 1839, and Charles, the brother of John Belotti, became a partner in said firm, the said John having retired therefrom; that the new firm continued until 1842, when it was succeeded by Andrew Gugerl and Padlo Carughi, who became partners and did business under the firm of Gugerl & Carughi; that he had been clerk under all the partnerships, and was well acquainted with the business of the



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house during the changes of the partnerships; that from the 25th March, 1823, to 15th Nov., 1824, goods were sold by the plaintiffs to Fontana to a large amount, and on the 16th April, 1825, the sum of £485-13-10-1, remained due and unpaid, and had never been paid, &c. That the draft for thirty pounds, dated 16th Oct., 1824, was given in part payment of the account, and he knows that the signature of the acceptance thereon, is in the hand writing of the said Felix Fontana, and that he has become acquainted with his hand writing, from having seen it in his letters between the years 1823 and 1825; that said bill of exchange was duly presented, &c., but had not been paid, &c.; that Fontana absconded from England early in the year 1825, and had not been heard from until recently.

Upon this proof of the hand writing, the plaintiffs offered to read the bill of exchange, to which the defendant objected; but the objection was overruled and the bill was read to the jury.

The defendant proved that in the year 1832, Fontana was in Nashville, Tenn., and came to this State about the 20th Feb., 1839, and died about the 1st March following; that he did business openly after his arrival in this State, and up to his death, &c.

The defendant then moved the court to instruct the jury as follows:

1. "The burden of proving affirmatively all of the issues joined between the said parties, lies upon the plaintiffs and the jury will find for the defendant such of the said issues, if any, as the plaintiffs have failed to prove."

2. "That the right of action of said plaintiffs against said Fontana, accrued *in this State*, when said Fontana first came into this State, and therefore unless the jury believe from the evidence, that said Fontana first *came into this State*, prior to the passage of the act of the General Assembly of the State of Missouri, mentioned in the four replications to the first and second amended pleas, they will find the issues joined upon the said four replications for the defendant."

The court gave the first, but refused to give the 2nd instruction; to which refusal the defendant excepted.

The only questions presented on the record and necessary to be decided by this Court are, first, was the hand writing of Fontana, on the bill of exchange, sufficiently proved to permit the bill of exchange to be read as evidence to the jury? And second, did the court err in refusing to give the second instruction to the jury?

1. There are different modes of acquiring a knowledge of the hand-writing of another, to enable a witness to testify to its genuineness.—

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*Reyburn, adm'r., &c. vs. Belotti & Gugerl.*

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One means of information, is from having seen letters or writings, purporting to be the hand writing of the party, and having afterwards personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or by such adoption of them into the ordinary business transactions of life, as induces a reasonable presumption of their being his own writings. 1 Green. Ev., § 577. It is not indispensable to call the individual to whom the letters were addressed, for the purpose of proving the hand writing, as any one through whose hands the letters have passed, is equally competent, such as clerks, &c. 3 Stark Ev., note 914, p. 1324.

Applying the foregoing rule to the evidence of Gwyn, the witness, who was clerk in the house of Belotti & Gugerl, at the time Fontana contracted the debt in question, and it was sufficient to authorize the reading of the bill of exchange, as evidence to the jury. The witness is not full and clear in his statement of the particular mode by which he obtained a knowledge of the hand writing of Fontana, so as to be able to swear to it; the omission does not however, effect the competency of his evidence. If the statement or the witness was not satisfactory to the defendant, it was his right to have required him, on cross examination, to explain more fully the means of his information. The case of *Moody vs. Ronell*, 17 Pick., 494, presented a question very similar to the one under consideration, and the court in that case sustained the view which we here take; the court however remark, that the case might present a different question, if the witness were under a *viva voce* examination, because where the omission was suggested, if the party calling him should decline asking him the direct question, as to his means of knowledge, it might create some suspicion, but this inference does not arise, where the witness is not present.

But it is contended that the witness was too young, at the time he professes to have acquired a knowledge of Fontana's hand writing, to have done so, and therefore, the bill of exchange, on his evidence alone, should not have gone before the jury. If the facts disclosed by the witness show that he could not reasonably have obtained a knowledge of Fontana's hand writing at the time stated, still, the court would not have been warranted in withholding the evidence from the jury; and how far his statements were within the range of probability, and entitled to credence, was a question properly left to the decision of the jury. We therefore see no error on this point.

2. The question presented by the second instruction, and which the

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Circuit Court refused to give to the jury, comes fully within the range of the decision made by this Court, in the case of *King vs. Lane*, 7 Mo. R., 241, and affirmed in the case of *Shreve vs. Whittelsey*, ib., 473.

Where a party demurs, and his demurrer is overruled, and he withdraws the demurrer and pleads, he thereby waives the question of law raised by his demurrer, and cannot raise the question in this Court.— This we understand, from the record, was the course pursued by the defendant on his demurrer to the plaintiffs' replications. If he had confidence in the question of law raised by his demurrer, he should have let judgment been entered thereon, and not have withdrawn his demurrer and rejoined.

For the foregoing reasons the judgment should be affirmed, and Judge NAPTON concurring herein, the same is affirmed.

SCOTT, J., *dissenting*.

The deposition of Gwyn does not state that he ever saw Fontana write; his knowledge of his hand writing was only derived from seeing it; and this has always been held insufficient to enable a witness to prove the hand writing of another. The judgment ought, in my opinion, to be reversed from this cause.

## PRENTISS vs. WARNE.

1. Removal by a tenant and giving the key to the landlord, before the expiration of the term, does not, by operation of law, amount to a surrender of the term.
2. Where a tenancy is thus determined before the term is ended, the tenant is liable for the rent.

## APPEAL from St. Louis Court of Common Pleas.

HAIGHT & SMITH, *for Appellant, insist:*

1. The tenant removing and giving the key to the landlord, amounts to a surrender, by operation of law. Chitty on Contracts, 2nd Ed., 329; Grimman vs. Legge, 8 Barnwell & C., 324; Whitehead vs. Clifford, 5th Taun., 518.

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2. Where a tenancy is thus determined in the middle of a quarter, whilst the rent is current, the tenant (without express agreement) is not liable for a proportion of the current quarter's rent, from the preceding quarter day to the day of quitting. Chitty on Contracts, 330; Hull vs. Burgess, 5 Barn. & Cres., 332; Grimman vs. Legge, supra; Yule vs. Yule, 24 Wend., 76; Randall vs. Rich, 11 Mass., 494, ib. 488.

This transaction was with Bredell, the original landlord. It will be remembered, Warne had no interest in the premises, except his liability to pay rent. The transaction between Bredell and Holm discharged Warne, and put an end to the lease. This falls within the principle that a payment to the original landlord is a good payment and will discharge the tenant. Chitty on Contracts, 335; 4th Durn. & East., 511.

*PRIMM, for Appellee, insist:*

1. The lease from Warne to Prentiss was not a constructive surrender by Warne to Bredell.—It was not an assignment of Warne's term, because Bredell, long after, acted as the agent of Warne in the receipt of rents, and with knowledge of the lease to Prentiss, and assent thereto.

2. The correctness of the legal position assumed in the second point made by appellant, is not denied; but, unfortunately for him, he is unsustained by the testimony. Warne did not dispossess Holm; he knew nothing of him.

*McBRIDE, J., delivered the opinion of the Court.*

This was an action of *assumpsit* brought in the Court of Common Pleas of St. Louis county, by Warne against Prentiss. The declaration contains several counts; the first averred a special contract for the leasing of a tenement for two years and three months, at annual rent of \$1000, to be paid quarterly, &c.; the second for use and occupation.

The pleas were *non-assumpsit*, set-off and payment, upon which issues were taken and a trial was had, which resulted in a verdict for the plaintiff, with the assessment of damages, and a judgment thereon. The defendant filed a motion for a new trial, because the verdict was against evidence, the damages assessed are excessive, and the court erred in refusing the defendant's instructions. His motion was overruled by the court, to which he excepted, and brings the case here by appeal.

The bill of exceptions shows, that on the trial in the court below, the following facts were elicited:

On the 12th October, 1840, Edward Bredell leased to Thomas S. Warne a storehouse and cellar, situate on Main street in the city of St. Louis, for the term of three years, at the yearly rent of \$1000, payable quarterly. That if the rent was not punctually paid, or paid within twenty days after due, the failure should operate a forfeiture of the lease; and that the premises were not to be occupied as a drug store or a grocery, or underleased without the written consent of Bredell.

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On the 12th July, 1841, with the consent of Bredell, Warne under-leased to Russell Prentiss, for the term of two years and three months, the same premises, and upon the terms and restrictions contained in the contract between Bredell and Warne. Prentiss took possession and occupied for three months—that is, from the 12th July, 1841, to 12th October, 1841—and paid the rent to Bredell, as the agent for Warne.

On the 12th October, 1841, Prentiss leased the premises, by verbal agreement, to John G. Holm, who went into possession and who paid the accruing rent, up to the 12th April, 1842, to Bredell, as the agent of Warne. That about the 1st October, 1842, Holm had a conversation with Bredell concerning the occupancy of the house, when Bredell proposed to lease him the house at \$800 per annum, provided Holm would take a lease from him at that rent, for a year or more, but he declined giving that sum, and offered \$600, which Bredell refused to take, and requested Holm to quit the possession, and directed him where to leave the key of the house, which he did.

After the conversation between Bredell and Holm, the former leased the premises to Guild & Dorwart, who, previous to 12th October, 1842, commenced moving a few things into the store, and their rent commenced on the 12th October, 1842.

The defendant moved for the following instructions to the jury, to-wit:

1. "That if the jury believe from the testimony that one Edward Bredell leased the house and lot to Warne, for a certain length of time mentioned in said lease, and that before the expiration of said lease, Warne leased the premises to Prentiss, with Bredell's consent, for the whole of the remaining portion of the term, and Bredell received rent of Prentiss, it was an assignment of Warne's whole estate to Prentiss, and that the relation of landlord and tenant did not exist between plaintiff and defendant, and this action cannot be maintained under the pleadings and proofs therein.

2. If the jury find that there was a surrender prior to the end of the quarter ending 12th October, 1842, the defendant is not liable for the current quarter, or for any rent after 12th July, 1842.

3. Warne having leased for three years, if it appear that he transferred the whole of his term to Prentiss, and if it appear, further, that before the expiration of the term, Bredell assumed the control of the premises and put a tenant in possession, no rent can be recovered from Prentiss after Bredell put such other tenant in possession." The court refused to give said instructions; the defendant excepted, and has brought the case here and seeks to reverse the judgment. The grounds assumed



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by the plaintiff in error are, that "the removing and giving the key to the landlord amounts to a surrender, by operation of law. Where a tenancy is thus determined in the middle of a quarter, whilst the rent is current, the tenant (without express agreement) is not liable for a proportion of the current quarter's rent, from the preceding quarter day to the day of quitting."

In support of the first of the foregoing propositions, we are referred to the case of *Grimman vs. Legge*, 8 Barn. & Cres., 324, where it is said that A demised to B the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B told A that she would quit immediately. The latter answered that she might go when she pleased. B quitted, and A accepted possession of the premises; and it was held that A could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter, nor rent *pro rata* for the actual occupation of the premises for any period short of the quarter. Here was an agreement between the parties to rescind the contract, and as the rent did not fall due until the termination of the quarter, the right to recover the rent, according to the contract, was destroyed, and no recovery could therefore be had.

The next case referred to is in 5 Taun., 518, *Whitehead vs. Clifford*, and is a case where the landlord, in the middle of a quarter, accepted from his tenant the key of the house demised, under a parol agreement that upon her then giving up the possession, the rent should cease; and she never afterwards occupied the premises, it was adjudged that the plaintiff could not recover.

Both of the foregoing cases come short of sustaining the proposition that the removal of the tenant and the giving the key to the landlord amounts to a surrender by operation of law. On the contrary, the law permits the parties to make their own contracts, and where they stipulate in express terms that the abandonment of the premises and delivery of the key shall be a surrender, their agreement is enforced.

The second proposition being founded upon the first, and the first not sustained by the authorities, the court correctly refused to declare it to be law.

The judgment of the Court of Common Pleas ought to be affirmed, and the other Judges concurring, the same is affirmed.

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*Moreland & Barnum vs. McDermott.*

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MORELAND & BARNUM vs. McDERMOTT.

Where, after the close of plaintiffs' evidence, defendant asked and the court gave an instruction, which defendant announced to the court sufficient to dispense with proof by defendant, and after the argument of plaintiffs' counsel, the court gave different instructions, the court should have permitted defendant to introduce his evidence—and if not permitted, it will be error not to grant a new trial.

APPEAL from St. Louis Circuit Court.

*POLK, for Appellants, insists :*

1. The court below ought to have sustained the motion made by the counsel of appellants, on the close of plaintiffs' case, to exclude so much of Janney's deposition as relates to the sale of the slave Austin.

For, the witness Janney not only proved in his deposition that there was a bill of sale of the slave Austin to appellee, which bill of sale was not produced at the trial, but also that he had himself drawn it.

2. The second instruction given to the jury, after the close of the argument to the jury by the counsel of the appellee, was erroneous. For, in all cases in which a party claims title to property by virtue of a written instrument, he must show the delivery of the instrument to him. But the production of the instrument at the trial by the party who claims under it, is sufficient proof to the jury of the delivery of the instrument to that party.

3. The court erred in giving the third instruction to the jury after the close of the argument by plaintiffs' counsel;

Because that instruction does not leave it to the jury to pass upon the *bona fides* of the pretended sale of the negro Austin to the plaintiff by John C. Rogers & Co.;

And there was evidence on the record which was intended and offered to impeach the *bona fides* of that transfer.

4. The fourth of the instructions last given to the jury was erroneous, because it assumes that the slave Austin was sent by McDermott to be sold in Montgomery or Mobile, whereas the testimony does not show that the sale of the negro was to have been confined to Montgomery or Mobile; but that he could have been sold at any other place as well as at those places, under the authority given to the agent.

5. The sixth instruction is not law, because it asserts that the principal cannot make the acts of his agent obligatory upon him by a subsequent ratification, unless such ratification be by an express sanction of them.

But that a positive and direct confirmation is not necessary, see Story's 'Agency, secs. 253, 255 and 258.

6. The court below committed error in giving the seventh instruction to the jury, because that instruction assumes that there may be a sale operative to pass title to property, when such sale was to be evidenced by a bill of sale, and when such bill of sale has been actually executed as such evidence, but not delivered; which is tantamount to saying that title to property may be passed by a sale before the sale is perfected.

7. The court below ought to have granted a new trial to appellants, because of the matters set forth in the affidavit of Barnum, filed in support of the motion therefor, upon the 8th and 9th reasons assigned.

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First. The affidavit shows that the defendants below were surprised by the action of the court, and by that action were deprived of the opportunity and right of availing themselves of testimony, which the affidavit shows was material and in court ready to be produced, and which the affiant verily believed would have secured a verdict, even upon the instructions as they had actually been given.

Second. The affidavit also shows that the action of the court deprived the defendants of the argument of their counsel to the jury upon the testimony in the case.

Upon the first ground of surprise, I refer to the following authorities: See *Fleming vs. Simpson* 1 Man. & Ry., 267; (17 Eng. C. L. R., 249;) *Holland vs. Hopkins*, 2 Bos. & Pul., 243; which was a case in which plaintiff was *non pros'd.* by his counsel having filed incorrect bill of particulars, and the court set the non-suit aside, allowed the bill of particulars to be amended, and gave plaintiff an opportunity of trial.

Upon the second ground of surprise, I refer to the following authorities: *Davis vs. Mason*, 4 Pick., 156; *Cutter vs. Rice*, 14 Pick., 494.

*GOODE, for Appellant, insists:*

1. The court did not err in refusing said motion to set aside said judgment and grant a new trial. If there be error in the action of the court below, it must appear from the record. This Court will presume that the Circuit Court correctly refused a new trial unless the contrary be clearly shown. *Boon vs. Corler*, 3 Mo. R., 10; *Steel vs. McCutchen*, 5 Mo. R., 522; *Dodson vs. Johnston*, 6 Mo. R., 599.

2. The finding of the jury is justified, and was demanded by the law and facts of the case.

*McBRIDE, J., delivered the opinion of the Court.*

Roger McDermott brought his action of detinue for a slave, against Moreland and Barnum, in the Circuit Court of St. Louis county. The defendants pleaded the general issue, on which the cause went to the jury, who found for the plaintiff. The defendants moved for a new trial, assigning, after the usual reasons, the two following, to-wit: 8th. "Because the counsel of the defendants, and the said defendants, by the instructions of the court given to the jury after the counsel of the plaintiff had closed their argument to the jury, were taken by surprise, and the said defendants were deprived of the benefit of argument before the jury upon the facts in evidence as applicable to said instructions, so given as aforesaid.

9. "Because the said defendants and their counsel were further taken by surprise by the instructions given, as stated in the 8th preceding reason, and, in consequence, were prevented from offering to the jury testimony which said defendants at the time had in the court room, ready to be produced and given to the jury; which said testimony was fully applicable and to the point, and strong in favor of said defendants upon the said instructions so given by the court, as stated in said eighth reason,

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but not applicable to the case as it stood under the instructions given by the court at the close of the testimony upon the part of the plaintiff."

This motion was accompanied by an affidavit of the defendant Barnum, to the truth of the material statements made in the 8th and 9th causes above set out. The court overruled the motion and refused to grant the new trial prayed for, whereupon the defendants excepted and appealed to this Court.

The bill of exceptions, after setting out the evidence given by the plaintiff on the trial in the court below, (which we do not intend to examine) proceeds to state, "thereupon the counsel of defendants prayed the court to give the jury the following instruction, upon the case made by the plaintiff: 'If the jury find from the evidence that the sale under which the plaintiff claims as purchaser of the slave Austin and others, from John C. Rogers & Co., was evidenced by a bill of sale or other instrument of writing which is not produced, they ought to find for the defendants;'" which instruction the court gave to the jury. Thereupon, one of the counsel of defendants stated that the defendants had witnesses in court to be examined in his behalf; but upon the instruction given by the court upon the plaintiff's case, they deemed it not proper to call them, and would thereupon, on their part, submit the case to the jury on the instruction given, without offering their testimony, and without argument. But, after the argument of the case by both of plaintiff's counsel, upon the whole of plaintiff's testimony in all its bearings, as well as upon the point covered by the instructions so given by the court, as aforesaid, the court then gave the following further instructions to the jury: "If the jurors believe from the evidence that the plaintiff's right to the slave in question accrued in virtue of a sale of the slave by J. C. Rogers & Co. to the plaintiff, and such sale was evidenced by a bill of sale or other instrument of writing, it devolves on the plaintiff to produce such bill of sale or writing in evidence to the jury; and unless such bill or writing is produced in evidence in this case, the verdict of the jurors ought to be for the defendants."

"That the jurors, in considering the proof in this case, are bound to confine their attention to what has been given or admitted in evidence; and that no fact otherwise ascertained by them, is proper for their consideration in making up their verdict."

"If the jury believe from the evidence that Roger McDermott, the plaintiff, did, in the year 1842, purchase the negro Austin from John C. Rogers & Co., for a valuable consideration, or received him in payment or part payment of a debt due said McDermott, by Rogers & Co., Mc-

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Dermott's title to the negro, as between those parties, was good, and he is entitled to a verdict, unless he has disposed of the negro, by himself or his duly authorized agent, to the defendants, or some other person."

"And if said McDermott, after acquiring said negro from Rogers & Co., sent said negro by his agent to Alabama, to be sold for him in Montgomery or Mobile, and, contrary to the tenor of such agency, he was carried off to New Orleans and St. Louis, the title of McDermott is not lost to him, even against a *bona fide* purchaser, for valuable consideration."

"One who buys personal property, buys at his peril, and he must take care for himself that he purchases from one really having a title or fully authorized to sell, otherwise he will lose the property as against the real owner; and this rule not only holds as to ordinary purchases, but also as to sales by sheriffs and constables."

"That although the jury shall believe that Hugh Rogers got possession of the negro Austin in Mobile, and did bring him to this place, and did here represent said negro as his, and did offer to sell him, or did actually sell him, yet, if they believe from the evidence that the said negro was the property of the plaintiff, at the time he came into the possession of said Rogers, and that the plaintiff did not give authority or expressly sanction the acts and doings of said Rogers in regard to said negro, then his right and title to said negro was in no wise affected or impaired thereby."

"That if the jury shall believe from the evidence that there was a bill of sale or other instrument of writing executed by John C. Rogers & Co. at the time the said negro Austin was sold to the plaintiff, McDermott, and which writing was intended to evidence said sale, yet, they must also believe from the evidence that said bill of sale or instrument of writing was delivered by John C. Rogers & Co., or their authorized agent, to the plaintiff, and received by him or his agent, otherwise the plaintiff cannot be required to produce or account for the same."

To the giving of the foregoing instructions, the defendants' counsel objected and excepted.

From the foregoing facts, it is manifest that the court did not, in refusing to grant the defendants a new trial, exercise its discretion soundly, if the court, in fact, had any discretion in the premises. But it appears to us not to be a case in which the court had a discretion, but one wherein the court should have tendered to the defendants the right of introducing their evidence after the close of the argument by the plaintiff's counsel, or have granted the motion for a new trial. Whilst it is commendable in



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the court to change its opinion when convinced of error, yet it should be cautious to see that such change does not prejudice the rights of parties.

The judgment of the Circuit Court is reversed, and the cause remanded.

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THE CITY OF ST. LOUIS vs. McDONALD.

A person who contracts to do certain work for another, and is discharged or prevented from completing his work, cannot recover the whole contract price, without shewing a faithful compliance on his part.

APPEAL from St. Louis Court of Common Pleas.

*KNOX, for Appellant, insists:*

1st. The measure of damages, (if any were recoverable,) was not the full amount of the installments, as stated in the 2nd instruction given, but the actual profits the plaintiff would have made, had he completed the contract, or the actual damage he sustained in consequence of being thrown out of employment. 7 Greenl. Rep., 51; Miller vs. Mar. Church, 6 Greenl. Rep., 208; Nourse vs. Snow, Chitty on Contracts, 3rd Amer. Ed., 343; 21 Wend., 457.

2nd. No action could be sustained upon said contract, until McDonald had demanded the certificate of the Street Inspector, for the amount due.

3rd. The contract being made with a municipal corporation, under an ordinance regulating the making of such contracts, of the existence of which the plaintiff was bound to take notice, the provisions of said ordinance are as much a part of the contract as if they were expressly inserted.

4th. The Court of Common Pleas erred in excluding evidence, that the plaintiff was so addicted to drunkenness, as to be incapable of performing his contract.

5th. The 1st instruction given, is erroneous, inasmuch as it says that the jury, in order to find for the defendant, must find an entire failure on the part of the plaintiff, to comply with his obligation.

6th. The 4th instruction given, was erroneous.

7th. The 3rd instruction asked by the counsel for defendant, should have been given. Chitty on Contracts, 3rd Amer. Ed., 16; Chitty's Pl., 7th Amer. Ed., 351-2; 2nd John. R., 207, Green vs. Reynolds.

8th. The court erred in refusing the 4th instruction, asked by defendant's counsel.

*CALLAHAN, for Appellee, insists:*

1st. The court below properly overruled the motion in arrest. For, the declaration, though not

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very formal in some of its parts, is in substance good enough, and sufficiently supports the judgment.

2nd. The refusal of the Court of Common Pleas to set aside the verdict and grant a new trial, did not involve error.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of assumpsit, brought by McDonald against the City of St. Louis, upon a written contract between the parties, in which McDonald became the contractor for cleaning certain streets in the City, at a specified price. By the agreement, McDonald was to receive his pay in monthly installments, and it was further agreed, that if he neglected to perform his work, to the satisfaction of the Inspector of the district where the work was to be done, the said Inspector might cause the work to be performed by some other person, and deduct the expense from McDonald's compensation. The contract provided for the continuation of McDonald's services for nearly a year, to wit, from the 14th March, 1845, to the first Monday of March, '46. It was further agreed, that the contractor should receive City warrants in payment of his stipulated price. The plaintiff obtained a verdict for \$807 92.

It appeared upon the trial, that the street Inspector was dissatisfied with the manner in which McDonald's work was done, and that he was discharged on the 28th of April, 1845, by a notification from the Mayor, declaring his contract forfeited. Evidence was given on either side, to show the manner in which McDonald had done his work. The evidence on behalf of the plaintiff tending to show, that he had performed his contract up to the time of his discharge, and that on behalf of the defendant being aimed to prove the reverse.

The court instructed the jury, as follows:

1. "There is no reservation in the contract given in evidence of the right to supersede the contractor, and therefore the jury must find an entire failure on the part of the plaintiff to comply with his obligation, in order to find for the defendant.

2. If the jury shall find from the evidence, that the contract was in part fulfilled, the remedy of the City for any partial failure, was by employing hands at the expense of the contractor, to complete the work; and on such finding the jury must give the plaintiff the full amount of the installments due and remaining unpaid on the contract at the time of instituting this suit.

3. The jury will credit the City with such payments as they shall be

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satisfied from the evidence were made for and on account of work done by others, which ought to have been done by the plaintiff, before he was dismissed by the street Inspector.

4. If the jury find from the evidence, that the street Inspector, acting under orders from the Mayor, declared to the plaintiff, that his contract was forfeited, and proceeded to contract with another person for the work, which had been let to him, that is sufficient evidence to sustain the plaintiff's averment, that he was prevented, discharged and forbidden from executing his contract."

Exceptions were taken to these opinions of the court, and the case is brought here by appeal.

The only question we shall examine, is the one presented by the instructions. The Court of Common Pleas seemed to be of opinion, that the only remedy for a failure on the part of McDonald to comply with his contract, was the one which the City had in terms provided for in the contract, and from this position drew the inference that his damages should be the entire compensation agreed upon, deducting of course the amount he had actually received. The ordinance of the City under which this contract was made, required the street Inspector, whose duty it was to make contracts of this character, to have it stipulated in the contract, "that if the contractor, in the judgment of the street Inspector, at any time failed to fulfil his contract, or if he at any time failed to obey the directions of the street Inspector in relation to said work, the street Inspector might cause the said work to be done at the expense of the contractor and deduct the expense thereof from the amount contracted to be paid to him by the City, and in case such expense should exceed said contract price, that said contractor and his securities should be bound to repay such excess to the City; and that if the contractor died or became unable or failed a second time to perform his contract, the Mayor might, upon the fact being represented to him, by the street Inspector, declare such contract annulled, and that the contract was entered into subject to the City Ordinances." (Ordinances, &c. p. 283.) This provision in relation to the right of the City to dismiss the contractor, under certain contingencies, was omitted in the contract with McDonald, though it was stipulated as the ordinance required, that if McDonald failed to do his work in a manner satisfactory to the street Inspector, that this officer might employ others to do the work and charge the expense thereof to McDonald. If we adopt the construction which the court below gave to this contract, and agree with that court in holding the only redress of the City to be the one provided for in the contract, we cannot sanction the

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rule of damages, which that court laid down to the jury. That rule was recognized by this Court in the cases of *Rucker vs. Edding*, and *Little vs. Mercer*; but it was never applied in a case, where the party seeking an entire compensation for his contract for a partial performance, has failed on his part to comply with his contract, up to the time of the act of prevention. Is it not manifest, that to apply the rule in such a case, would work gross injustice? Where the dismissal of the servant or laborer, or contractor, is brought about by his own negligence or unfaithfulness in business, shall such servant or contractor be permitted to recover his entire wages, even though no power of discharge has been reserved? The cases in which the servant has been allowed to recover his entire wages, are cases, in which he has been without fault, and to entitle him to such recovery, he must prove a faithful compliance on his part. If the law were otherwise, the servant would find it to his interest to neglect that of his employer. If he be allowed to recover a whole year's wages for two months work, and that so badly done as to occasion his discharge, he would find a profit in a negligent or inefficient discharge of his duties. In considering the application of this rule of damages, the right of the Mayor to dismiss the contractor should be laid out of the question. If the whole compensation be claimed, where there has been only a partial performance, the contractor must at least show a faithful compliance on his part, so long as he was permitted to proceed with his work.

We do not mean to apply these remarks, except hypothetically to the case of the appellee. Whether he was in fault or not the verdict of the jury has not determined. That question was not submitted to them.—Instructions placing the case on this ground were asked, but refused. The judgment will therefore be reversed and the cause remanded.

FINNEY, LEE & CO. vs. STEAMBOAT FAYETTE.

1. In proceedings against a steamboat, the rules of maritime law govern where there is no statutory law.
2. Maritime liens are divested by a judicial sale in whatever jurisdiction it may be decreed. [See *Steamer Raritan vs. Smith*.]

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## ERROR to St. Louis Court of Common Pleas.

*POLK, for Plaintiffs in error, insists:*

1. The demand of the plaintiffs in error was a lien on the boat by the laws of this State. See Acts of 1839, p. 13; and as such, went with her as part and parcel of her wherever she might go; so that the title set up by the defendant's pleas was still encumbered with the lien in the hands of Alexander, the purchaser. Story's Conflict of Laws, p. 268, sec. 322, b.

2. The pleas do not state that the demand, on which the boat was sold in Illinois, was a lien on the boat by the laws of that State, but that it was only entitled to priority; so that, if the matter contained in the pleas constitutes a good bar to the plaintiffs' recovery, then it follows, that whenever personal property in one State of the Union is subject to a lien which is valid by the laws of such State, shall be removed to another State, and while there shall be seized and sold by ordinary legal process, the purchaser at such sale will acquire a title to the property freed from the lien.

That mere *priority* does not amount to a lien, and will not be regarded by the courts of another State, is shown by the following cases: Harrison vs. Sterry, 5 Cranch, 289; Ogden vs. Saunders, 12 Wheat., 361

3. I maintain that the plaintiffs in error had, by our statute, a lien of the same kind and force as a tradesman has, by the maritime law, for materials and repairs, or a seaman for wages; and if so, would be entitled to satisfaction of their demand out of the boat, even if Alexander claimed title to her by virtue of a sale under execution in our own State, said claim, upon which the sale took place, not being a lien on the boat. The Jerusalem, 2 Gal., 345; Chit. Gen. Prac. 521; 3 Kent's Com., 196.

4. If the claim of the plaintiffs in error, as insisted in the preceding point, would be good against Alexander's title, even if it had been acquired by proceedings instituted in the courts of our own State, upon a demand which was *not* a lien on the boat, much more is it good as against the title of said Alexander; derived, as it is, by virtue of a sale in the course of proceedings instituted in the courts of another State, upon a demand which is not stated to be a lien by virtue of the laws of that State.

5. But even if the claim mentioned in defendant's pleas had been a lien on the boat by the laws of Illinois, and had been pleaded as such—though it appears from the record it was not—still, being in conflict with and in opposition to the lien of the plaintiffs upon the boat, which was created by the laws of this State, the courts of this State would give validity to the lien created by our own laws, rather than to the adverse one created by the laws of a foreign State: I mean a State in a legal sense foreign to us. Story's Conf. of Laws, p. 268, secs. 323, 324, et seq.

6. The provision of the Constitution of the U. S., art. 4, sec. 1, that "the records and judicial proceedings of each State shall have full faith and credit in every other State," does not give them the same effect in every other State, that they may have in the State in which they originated. It is only tantamount to providing, in the language of the court in the case of Bissell vs. Briggs, 9 Mass., 462, that "they cannot be contradicted or the truth of them denied."

This article of the Constitution, therefore, is not susceptible of the construction, that if the sale of the boat set up in the pleas passed the title in the State of Illinois, clear of the plaintiffs' lien, that therefore it is not subject to that lien in this State, by the laws of this State.

On the contrary, the principles of comity would require that if the plaintiffs' claim existed as a lien on the boat, when she went into the State of Illinois, and before and at the time of the judicial proceedings and sale set out in the pleas, then such lien should be protected and enforced by the laws and courts of that State. Story's Conflict, p. 268, sec. 322, b.



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**LESLIE & HAMILTON, for Defendant in error, insist:**

The question in this case is, does the sale under the proceedings in the State of Illinois confer a title on David C. Alexander, the purchaser?

1. Sales under execution confer a valid title on a *bona fide* purchaser. This will not be disputed. Long on Sales, 444, and cases there cited.

The sale in this case was made by virtue of proceedings under a law of Illinois creating a *specific lien* upon the boat, and as neither the jurisdiction of the court in which the proceedings were had, nor the regularity of the proceedings, are questioned, we think the sale conclusive upon the parties. Story's Conflict of Laws, pages 267, 268, 271, sec. 325, d; also see pages 335, 336.

If the plaintiffs had a lien upon the boat, they should never have permitted her to leave the jurisdiction where the lien was created, Ill. R. S., 1833, p. 95, without taking steps to enforce such lien. By so doing, they would run the risk of just what has happened in this case, to-wit: the enforcement of a lien by virtue of the laws of a neighboring State, and a sale under the judgment of a competent tribunal; and this Court will give full effect, both to the law and the judicial action under the law. Story's Conflict of Laws, 271; Ohio Ins. Co. vs. Edmonson, 5 Louisiana R., 295 to 305; see Story's Con. of Laws, p. 334, sec. 400.

Foreign judgments and decrees *in rem*, are conclusive every where. See Rose vs. Himely, 4th Cranch, 269, 270; Conflict of Laws, 495, et seq.; Tucker's Com., 279; see also Starkie's Evidence, 1st vol., 232, note 1.

2. Whether the proceedings are *in personam* or *in rem*, if there be jurisdiction over the person in one case, or over the thing in the other, and such jurisdiction be proved, the same effect will be given here to a judgment rendered in Illinois that would be given to it there. 13 Peters, 312.—The rule applies to justices' judgments. 13 Ohio, 208; 3 Wendell, 267. The effect of the proceedings in Illinois is averred in the pleadings; it is alleged to have converted the property and passed a valid title to Alexander. The laws of Illinois and this State, giving liens for claims against boats, are similar; and the jurisdiction in this case attached and was perfected before any proceedings were commenced on the plaintiffs' claim.

**SCOTT, J., delivered the opinion of the Court.**

On the 2nd February, 1842, the plaintiffs in error commenced proceeding in the Court of Common Pleas of St. Louis county, against the steamboat Fayette, for the purpose of recovering a claim for supplies furnished said boat. The last item of the account bore date on the third November, 1841.

The defendant in error, by D. C. Alexander, representing himself as the owner of said boat, filed two pleas to the plaintiffs' demand, which being substantially the same, only one of them is copied. The 2nd plea was as follows:

"And for further plea in this behalf, the said David C. Alexander says, that the said plaintiffs ought not to have and maintain their aforesaid action against the above named defendant, because he says, that by an act of the Legislature of the State of Illinois, one of the United States of America, entitled "An act authorizing the seizure of boats and other vessels by attachment in certain cases," it is provided, among other things,

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that the wages of mariners, boatmen and others, employed in the service of such boats and vessels as run upon the navigable waters within the jurisdiction of said State, shall have preference over all other debts due from the owners and proprietors, and shall be first paid; and it is also further provided by said act, that any person having a demand contracted for wages as a boatman, may have an attachment, to be issued by any justice of the peace having jurisdiction thereof, against such boat or vessel, in any county where such boat or vessel may be found, which said attachment may issue against such boat by name only, and shall authorize and direct the seizure and detention of the same, with the engine, machinery, sails, rigging, tackle, apparel and furniture. And the said Alexander saith that one George Thurston, to-wit: on the fourth day of December, 1841, in the county of Tazewell and State of Illinois aforesaid, had a just and legal demand against said steamboat Fayette, which accrued on account of wages as a boatman on said steamboat Fayette, and that the demand of the said Thurston was within the jurisdiction of a justice of the peace in the said State of Illinois. And the said Thurston, heretofore, to-wit: on the 4th day of December, 1841, at the county of Tazewell aforesaid, sued out an attachment from a justice of the peace, duly and legally commissioned and acting as a justice of the peace, within and for said county of Tazewell, against the said steamboat Fayette, and prosecuted said attachment suit to final judgment against said boat, and the same was by a legal order or execution of the said justice of the peace issued upon said judgment, sold by the constable of said Tazewell county, according to the laws of the State in such case made and provided. And the said Alexander became the legal purchaser thereof, and the same was delivered to him at such sale; all of which will more fully and at large appear by the record and proceedings in said justice's court still remaining, and which are in the words and figures following, that is say: George Thurston vs. Steamboat Fayette; suit commenced by attachment, December 4th, 1841; debt \$34 34, on a note for services or wages on board the said boat as watchman and deck hand. Attachment issued on complaint in the following words, (to-wit:) State of Illinois, Tazewell county, ss. This day personally appeared before the undersigned, a justice of the peace in and for said county, George Thurston, who, after being duly sworn, deposed and saith, that the steamboat Fayette is indebted to him for wages while he was employed as boatman on board and in the service of said boat in the capacity of watchman and deck hand, in the sum of thirty-four dollars and thirty-four cents, and prays an attachment against [said boat.] Sworn to and subscribed before me,

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this 4th day of December, 1841. Geore Thurston. [Seal.] Alden Hall, J. P. And after plaintiff entering into the following bond, to-wit: Know all men by these presents, that we, George Thurston and David C. Alexander, are held and firmly bound unto the people of the State of Illinois, for the use and benefit of the owners of the steamboat Fayette, who may institute a suit hereon, in the penal sum of seventy-eight dollars and sixty-eight cents, for the payment of which we bind ourselves, our heirs and assigns, firmly by these presents. The conditions of this obligation *is* such, that whereas the above bound George Thurston hath, on the day of the date hereof, prayed an attachment at the suit of him, the said George Thurston, against the steamboat Fayette, for the sum of thirty-four dollars and thirty-four cents, lawful money of the United States, and and the same being about to be sued out, returnable on the eleventh day of December instant, to me, at my office in Pekin, in the county of Tazewell and State of Illinois: now, if the said George Thurston shall prosecute his said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the owner or owners of the said steamboat Fayette, all such costs in said suit and such damages as shall be awarded against the said George Thurston, his heirs, executors or administrators, in such suit or suits which may hereafter be brought for wrongfully suing out such attachment, then the above obligation to be void; otherwise to remain in full force and virtue. George Thurston, [Seal] David C. Alexander. [Seal] Taken and acknowledged before me, this 4th day of December, 1841. Alden Hall, J. P.

"Attachment issued 4th day of December, 1841, delivered to John M. Turney, constable, returnable before me at my office, in Pekin, on the eleventh day of December, instant, at 1 o'clock P. M., in the following form, to wit: State of Illinois, Tazewell county, ss. The people of the State of Illinois, to any constable of said county, greeting: Whereas, George Thurston hath complained on oath, before Alden Hall, a justice of the peace in and for said county, that the steamboat Fayette is justly indebted to him, the said George Thurston, in the sum of thirty-four dollars and thirty-four cents, for wages as a boatman, while he was employed on board of said boat in the capacity of watchman and deckhand, and the said George Thurston having given bond and security according to the directions of the act in such case made and provided: we therefore command you that you attach the said steamboat Fayette, if the said boat be found in your county, and detain the said boat with her engine, machinery, rigging, apparel and furniture; and the said boat, so attached in your hands, so to provide and secure, that the said boat with

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her engine, machinery, rigging and furniture may be liable to further proceeding thereon according to law, before the undersigned justice of the peace, and make return to me of your proceedings, at my office in the town of Pekin, in said county, on the eleventh day of December instant, at 1 o'clock P. M., and have you then and there this writ, hereof fail not at your peril. Given under my hand and seal, this the 4th day of December, 1841. Alden Hall, J. P., [seal,] justice's costs, \$1 18. December 11th, 1841, attachment returned endorsed as follows, to wit: Served the within attachment on the 4th day of December, 1841, on the following property, to wit: The steamboat Fayette. John M. Turney, C. T. C., costs, \$1 00. The owners of said boat not present, and no notice having been given to them of the pending of said suit, the cause continued to the 27th inst., at 1 o'clock, P. M., and notice issued as follows to wit: Notice is hereby given to the owners of the steamboat Fayette, that on the 4th day of December, 1841, a suit was commenced by attachment, against said steamboat Fayette, by George Thurston, before the undersigned a justice of the peace, in and for Tazewell county, State of Illinois; said attachment issued for the collection of the sum of thirty-four dollars and thirty-four cents debt, said by the said George Thurston to be due him from the said steamboat Fayette, for wages as a hand, while employed in running said boat in the capacity of a deckhand and watchman, and was returnable before me at my office, in Pekin, in said county, on this 11th day of December, 1841; and the said attachment having been returned, served by attaching said boat, and no appearance having been entered by the owners of said boat, the cause continued to the 27th inst., at 1 o'clock, P. M., at my office, in Pekin, in said county, at which time and place the cause will be tried, and unless you shall appear at the time and place for said trial, judgment will be rendered by default, and the said steamboat Fayette ordered to be sold to satisfy the same. Given under my hand, this 11th day of December, 1841.—Alden Hall, J. P. Notice delivered to John M. Turney, constable, returned endorsed as follows, to-wit: The within notice not served; John M. Turney, C. T. C. Pekin, December 27, 1841. Cause continued to the 5th day of January next, 1 o'clock P. M., and notice issued to the owners of said boat and delivered to John M. Turney, constable, as follows to-wit: Notice is hereby given, to the owners of the steamboat Fayette, that on the 4th day of December, 1841, a suit was commenced by attachment against said steamboat Fayette, by George Thurston, before the undersigned a justice of the peace, in and for Tazewell county, and State of Illinois. Said attachment issued for the col-

*Finney, Lee & Co. vs. Steamboat Fayette.*

lection of the sum of thirty-four dollars and thirty-four cents debt, said by George Thurston to be due him from said steamboat Fayette, for wages as a hand, while employed in running said boat, in the capacity of deckhand and watchman; that the said attachment was returnable before me, at my office, in Pekin, in said county, on the 11th day of December, 1841; and the said attachment having been returned served, by attaching said steamboat Fayette, and no appearance having been entered by the owners of said boat, the cause was continued to the 27th day of December, 1841, at 1 o'clock, P. M., at my office, in Pekin, in said county; and notice issued to the constable, notifying the owners of said boat of the time and place of trial, which notice has been returned by the constable without service, and the cause adjourned to the fifth day of January next, at 1 o'clock, P. M., at my office, in Pekin, in said county; and unless you shall appear at the time and place of trial, judgment will be rendered by default, and the said boat ordered to be sold to satisfy the same. Given under my hand, this 27th day of December, 1841.—Alden Hall, J. P. Notice returned endorsed as follows, to wit: Executed by putting up three copies of the within notice, December 28, 1841, as the law directs. John M. Turney, C. T. C. Costs, \$0 75. January 5, 1842. Plaintiff appeared, and no appearance having been entered on the part of the owners of the steamboat Fayette, plaintiff claimed on a note in the following form, to wit: Due George Thurston from steamboat Fayette, thirty-four dollars, for value received. St. Louis, Oct. 9, 1841. \$34. 00. C. F. Speyer, Cl'k. S. B. Fayette. And after hearing the proof and allegations of plaintiff, judgment is rendered against the said steamboat Fayette, for thirty-four dollars and thirty-four cents debt, and costs of suit.

Debt on note,	\$34 34
Costs of justice,	1 18
Do. continuance and note,	37 1-2
Do. do. do.,	37 1-2
Swearing one witness,	6 1-4
Witness fees, J. Alexander,	50
Const. fees, J. M. Turney,	1 75
Order of Jan. 1842, delivered to J. M. Turney, constable,	25

Order of sale issued January 5th, 1842, in the following form, and delivered to John M. Turney, constable, to-wit: State of Illinois, Tazewell county. The people of the State of Illinois, to any constable of said county, greeting: Whereas on the 4th day of December, 1841, George



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Thurston did commence a suit before the undersigned, a justice of the peace, in and for said county, by attachment against the steamboat Fayette, which attachment was returned, served by attaching said boat on the 4th day of December, 1841, returned on the 11th day of December, 1841, and judgment in said cause having been rendered in favor of the said George Thurston against the said steamboat Fayette, for the sum of thirty-four dollars and thirty-four cents, and four dollars and forty-eight cents costs. You are therefore ordered to make sale according to law, of said boat, or so much thereof as will satisfy the judgment and all costs of suit, and make due return. Given under my hand and seal, this 5th day of January, 1842. Alden Hall, J. P., [seal.] Order of sale returned endorsed as follows, to wit: Served on the steamboat Fayette, Jan. 5, 1842. John M. Turney, C. T. C. After legal notice the above named property was sold on the 15th day of January, 1842, for the debt and costs of the within named; and D. C. Alexander was the purchaser. Jan. 15, 1842. John M. Turney, C. T. C. Costs of sale, \$3 50. By means whereof, and by force and virtue of the aforesaid legal proceedings in the said State of Illinois, the said D. C. Alexander became, and was the legal owner of the said steamboat Fayette, and all her appurtenances aforesaid, and the said boat became thereby discharged and released from the debt or demand, in the said plaintiff's declaration mentioned, and this the said Alexander is ready to verify, &c. Leslie & Hunton."

To this plea there was a demurrer, which being overruled, the cause was brought here by writ of error.

This case is similar in principle to that of the steamboat Raritan vs. Smith, decided at the present term of this Court. It was there determined that the rules of the maritime law, were in proceedings against steamboats to govern, when there was a failure of statutory regulations. Maritime liens in respect to the mode in which they may be discharged, vary from other liens. A judicial sale will divest them, in whatever jurisdiction it may be decreed.

As to the argument that the statute of Illinois does not enact, that the demand under which the boat was sold, should be a lien upon her, it may be answered, that in the construction of the priority laws of the United States, it has been decided that under them a lien attaches at the commencement of a suit. U. States vs. Hooe, 2 Cr., 84. The law of Illinois gave a demand of the character of that stated in the plea, preference over all debts, and directed that it should be first paid.

The other Judges concurring, the judgment will be affirmed.

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## JULY TERM, 1847.

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### HALL vs. GUTHRIE.

1. Although the statements in a bill in chancery are not usually evidence against the complainant, yet, if the bill be sworn to, admissions made in such bill may be evidence against such party.
2. Statements made in such bill on the information of others, however, are no evidence, being at most but hearsay.

### ERROR to Platte Circuit Court.

#### STRINGFELLOW, *for Plaintiff in error.*

1. The agreement between the attornies only waived any objection to the paper offered, on the ground of its being secondary evidence. It expressly required full proof of the execution of the deed. The bill in chancery was the only evidence offered of the execution of the deed, or that the paper was a copy. It is insisted that the bill was no evidence. The statement in the bill was not made on the knowledge of the plaintiff, but only upon his information and belief. Such a statement in an answer could be no evidence. It is not even an admission; much less is it evidence that the paper was a copy, or that the deed had been executed. *Gamble & Johnston vs. Johnson*, 9 Mo. R., 605.

2. The court erred in leaving to the jury to decide upon the proof of the execution of the deed. That is a matter of law.

3. The pleas of defendant being special pleas, and not having been made under affidavit, should have been stricken out. Acts of '41 and '42 regulating Practice at Law.

#### HAYDEN, *for Defendant in error, insists:*

1. That it devolved upon the plaintiff, in the trial of the cause, to show by proof, to maintain his action, that the defendant, Guthrie, was not seized of an indefeasible estate in fee to the land mentioned in the declaration, at the time of the execution of the deed from Guthrie, as charged in

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*Hall vs. Guthrie.*

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the declaration. See 2nd Greenleaf Ev., sec. 241, p. 198; 2nd Mass. R., 433, Marston vs. Hobb; 4 do., 408, 441, 627; 17 Mass., 213; 5 Pick., 217; 5 Yerger, 41; 1 N. Hamp., 177; 3 Ohio, 220; 10 Mass., 403; 7 John. Rep., 376; Hallenback vs. Sedgwick.

2. That the proof offered and given by the plaintiff did not show that the defendant had broken his covenant of seisin. See the authorities above referred to.

3. The evidence given by the defendant was legal and admissible to prove that he had not broken his covenant of seisin. See 1 Greenleaf, p. 641, Lang vs. Raine; Bos. & Pul. 85, referred to in Greenleaf. See 2nd Greenleaf's Ev., 242-3, secs. 293-4-5—when deeds may be read to a jury where they are the foundation of the action.

NAPTON, J., *delivered the opinion of the Court.*

Hall brought an action of covenant against Guthrie, founded upon an alleged breach of the covenant of seisin contained in a deed to him from the said Guthrie. The defendant filed two pleas—*non est factum*, and a plea denying the breach in the words of the declaration. A trial was had, and, during its progress, a paper was read, in which it was agreed that "copies of the records of the deeds in the possession of Mr. Hall might be read in evidence in place of the originals; that is, that no objections should be made on the ground of secondary evidence; but they should be liable to all objections that the original would be." The plaintiff then read a copy of the deed from Guthrie and wife to himself, dated 1st March, 1842, and a patent from the Governor of this State, dated 5th December, 1833, conveying the land described in the first deed to William Silvers and his heirs, as part of the Seminary lands.

The defendant then read a deed from Silvers and wife to James Lawrence and John W. Lumpkins, dated 20th September, 1833; also a deed from Lawrence and wife, dated 20th May, 1836, to Samuel C. Owens, conveying the undivided half of said land, and a deed from Lumpkins and wife, dated 10th May, 1836, conveying their undivided moiety to Thomas H. Wilson and heirs. The defendant then read a deed from Wilson and wife to Samuel C. Owens, dated 4th June, 1836; and a deed from Samuel C. Owens and wife, dated 4th June, 1836, to Jacob Steele, of Bath county, Kentucky, conveying the whole tract in fee, with covenant of warranty, &c.

The defendant then offered to read a copy of the deed from Steele and wife to Luther Mason, but objections were made, because there was no proof of the execution of said deed. The defendant then read in evidence a bill for an injunction, in which said plaintiff charged "that he was informed and believed that Jacob Steele signed, sealed, acknowledged and delivered his deed to Luther Mason, whereby he, the said Steele,

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*Jones vs. Relfe.*

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granted, bargained and sold the said land to the said Mason; which deed the party complaining believed to be in the possession of said Mason, and prayed that Mason be compelled to produce it," &c. This testimony was objected to as any evidence of the execution of said deed, but it was admitted; and thereupon the plaintiff submitted to a nonsuit, which he afterwards moved to set aside. This motion being overruled, the case was brought to this Court.

A bill in chancery is not usually evidence against the party complainant, as many of its statements are supposed to be the mere suggestions of counsel; but where a bill is sworn to, as all bills must be whose purpose is to arrest the jurisdiction of another tribunal, it may be evidence against the party to the bill, if it contain admissions against his interest. The statement in the bill filed by Hall is, that he was informed and believed that a deed had been executed and delivered. The party does not profess to have any personal knowledge on the subject, nor is there any thing in the statement to *identify* the deed spoken of with the deed, a copy of which was then before the court. If a deed has a subscribing witness, that witness must be called, or if his absence is satisfactorily accounted for, his hand writing may be proved. If the deed was without a subscribing witness, the handwriting of the maker may be proved, or the deed, if acknowledged and recorded, according to the provisions of our statute is admissible in evidence without further proof. The evidence offered was merely secondary, and was not admissible, without accounting for the absence of primary evidence, and moreover, had no tendency to prove the execution of the deed offered, because there was nothing in the statement to show that the deed spoken of was the identical deed offered in evidence. *Call vs. Dunning*, 4 East., 53; *Abbott vs. Plumbe*, Dougl., 216.

Judgment reversed, and cause remanded.

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*JONES vs. RELFE.*

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A distress warrant having issued and been levied by Relfe, the U. S. Marshal, on the lands of Jones, certain notes were placed by J. in the hands of R., in 1837, to be collected and applied to the payment of the distress warrant—the transfer being made to procure a release of the lands of J. from the lien of the warrant—and subject to the approval or modification of the solicitor of the treasury. Held,



*Jones vs. Relfe.*

1. That to entitle J. to maintain an action of trover against R. for the notes, it is not sufficient merely to shew, that there was no power in any officer to release the lien of the warrant. It must also be shewn, that the modification made by the solicitor was such as to defeat the purpose of J., and that notice thereof had been given to R. and a demand made for the notes.
2. The plaintiff having closed his case upon such evidence, it was no error in the Circuit Court to refuse permission to introduce evidence shewing that plaintiff had acceded to the modification of the solicitor.

## APPEAL from St. Francois Circuit Court.

*FRISSELL, for Appellant, insists:*

1. That the court erred in instructing the jury, that the contract between the parties, created a power in Relfe by which he as Marshal and in behalf of the United States, had a beneficial interest, and that Jones had no right to revoke such power, and demand a redelivery of the notes, except as stipulated in such arrangement.

2. That the court erred in instructing the jury, that to entitle the plaintiff to revoke said power and to demand a re-delivery of the notes, it is requisite that he should prove, that the Solicitor of the treasury had acted upon the arrangement, and had rejected or modified the same, in such a manner as to entitle the plaintiff to a return of the notes.

First, Because the contract between Relfe and Jones was conditional in its terms, depending upon the contingency of his receiving land, released from the levy under the distress warrant. 5 Mass. R., 385, 541; Story on Contracts, sec. 231, 232, 237, 252, 258, 259; Chitty on Contracts, 73, 74; 2 Gill & Johns., 382.

Second, That the release of his lands from the levy, being contrary to law, and it being therefore impossible for the Solicitor of the treasury or any other person to release the lands from the levy, no interest in the notes vested in the Marshal, or in the the United States by virtue of the transfer mentioned in the receipt. Acts of Congress of May 15, 1820; Story's Laws, 1791; 9 Peters Rep., 8; 5 Mass. Rep., 385, Denny vs. Lincoln; Churchill vs. Perkins, 5 Mass. Rep., 541; 1 Bacon's Abr., 645, 650.

Third, That Relfe then was liable at any time to an action, if he neglected or refused to deliver the notes to Jones, or his order upon demand.

Fourth, That the matters which the plaintiff was required to prove, under the instruction of the court, throws upon him the proof of a negative proposition, and a matter which is peculiarly within the knowledge of the defendant. 1 Phillips on Evidence, 198, 199, 194, 200.

3. If the foregoing points should be overruled, it is insisted that the court in the exercise of a sound discretion and the furtherance of justice, should have allowed the plaintiff to offer evidence to show, that the Solicitor of the treasury, had acted upon the purposed arrangement and rejected it, after the plaintiff had announced that he had concluded his testimony.

*LEONARD & BAY, for Appellee, insist:*

1. The instruction of the court was properly given. The delivery of the notes to Relfe, for the purposes set forth in his receipt, vested in him, as the agent of the United States, an authority which the plaintiff Jones, could not defeat at his pleasure. Canfield vs. Monger, 12 J. R., 346.

2. To maintain trover, the plaintiff must prove that he had a right to the possession of the

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*Jones vs. Relfe.*

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property, at the time of the alleged conversion. *Fairbanks vs. Phelps*, 22 Pick., 535. In this case, Jones did not show any right to the possession of the notes. His only evidence, was the receipt of Relfe and his refusal to deliver them to the agent of Jones. 1 Chitty on Pleadings, 170.

3. The court properly refused to permit Jones to introduce additional testimony, after he had closed his case, and after the court had instructed the jury. It was a matter wholly within the discretion of the court, and there is no evidence that the court improperly exercised this discretionary power. *Rucker vs. Edding*, 7 Mo. R., 115; *Brown vs. Burrus*, 8 Mo. R., 30.

4. Even had the evidence been admitted, it would not have shown a right to recover, for the arrangement was approved of by the Solicitor of the treasury, and carried out according to the intention of the parties.

5. No exceptions were taken at the proper time to the instruction given, or to the refusal of the court to permit the plaintiff to introduce additional testimony. No exceptions were taken until after the refusal of the court to set aside the non-suit, and then the plaintiff, for the first time, made his exceptions. *Davis vs. Burns, et al.*, 1 Mo. R., 189; *Waldo vs. Russell*, 5 Mo. R., 387; 7 Mo. R., 251.

*NAPTON, J., delivered the opinion of the Court.*

This was an action of trover, brought by Jones against Relfe, in the Circuit Court of Washington county, but transferred, upon the application of Relfe, to St. Francois. A trial was had in the latter county, which resulted in a verdict against Relfe for \$9558. This verdict was set aside by the court and a second trial took place.

The plaintiff Jones gave in evidence the following receipt: "Received of General Augustus Jones, the notes named in the above list, amounting with interest, (calculated to the 1st November inst.,) to the sum of thirteen thousand six hundred and thirty-two dollars, transferred to me for the use of the United States, to collect and therewith satisfy a distress warrant issued from the office of the Solicitor of the treasury, on the 25th day of May last, and the surplus, after paying all fees for collection, to be returned to said Jones. It is understood, that this arrangement is made to endeavor to procure the release of the real estate of said Jones, now bound by the levy made under the authority of said warrant, and to be subject to the approval or modification of the Solicitor of the treasury, and if not authorized, the notes to be returned to said Augustus Jones, or order. Nov. 22, 1837. James H. Relfe, Marshal Missouri District." This receipt was preceded by a list of notes, amounting to the sum specified in the receipt.

The plaintiff then gave in evidence, the following order from Jones to Relfe: "Mr. James H. Relfe: You will deliver to Phillip T. McCabe, the notes and bonds specified in the foregoing list. May 31, 1841. A. Jones." It was proved by McCabe, that he, with the above order,

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*Jones vs. Relfe.*

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called on Relfe on the 15th June, 1841, and demanded the notes, to which Relfe replied, that he had not the said notes, that he had placed them in the hands of Arther L. Magenis, United States District Attorney, for collection, and that the whole of them had been collected, except the notes of J. L. Van Doren and Robert C. Bruffey, and that one of the notes of Van Doren had been collected, and about five hundred dollars on the notes of Bruffey. Witness was not certain whether any thing was said about the application of the proceeds of these notes to the payment of the distress warrant.

The plaintiff then read a letter from Relfe to him, dated 15th Nov., 1837, as follows: "Wednesday morning, 15th Nov., 1837. Sir: The mail brought out last night, contained a letter from Mr. Gilpin to me.— I wish you to bring your notes to Ste. Genevieve. Such discretion is left to me that I presume we can close the business. I will be at Dr. Linn's on Monday morning. Respectfully, James H. Relfe."

The plaintiff here closed his case, and upon application of the defendant, the court declared the law to be, as follows:

"The contract between the parties as evidenced by the receipt of 22d Nov., 1837, created a power in James H. Relfe, in which, as Marshal of the United States, and in behalf of the United States, he had a beneficial interest, and the plaintiff Jones had no right to revoke such power, and demand a redelivery of the notes, except as stipulated in the said arrangement; that to entitle the plaintiff to revoke said power and to demand a redelivery of said notes, it is requisite that he should prove, that the Solicitor of the Treasury had acted upon the arrangement and had rejected or modified the same in such a manner as to entitle the plaintiff to a return of the notes."

Thereupon the plaintiff asked leave of the court to supply the supposed defect in the testimony, as indicated by the above instruction; but the court refused to let in the evidence. The plaintiff took a non-suit and afterwards moved the court to set it aside, which motion was overruled. The plaintiff appealed.

The rejected evidence exhibited the following documents:

A statement of the Treasurer of the U. S., showing that Relfe had deposited on account of Jones, at different times, from 1838 to 1841, the amount of \$8612 29. A letter from the Sol. Trea., (Gilpin,) to Relfe, dated Oct. 3, 1837, authorizing Relfe to postpone the sale of Jones' land for six months. A second letter dated Dec. 12, 1837, from Gilpin to Relfe, urging him to transmit a copy of the levies, &c. A third from the same, dated Jan. 26, 1838, as follows: "Sir: The Hon. Lewis F. Linn,

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*Jones vs. Relfe.*

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Senator in Congress from Missouri, has handed me your letter of the 22nd Nov., relative to the debt of Gen. Augustus Jones. Of course there is every disposition to extend to him any indulgence consistent with the security of the United States and the rules governing this office. In regard to his proposal to transfer to the U. S. certain notes therein stated, I have to say, that you are authorized to receive the same and apply the proceeds, when paid to his debt, but not to accept them in lieu of any existing lien, nor for the purpose of affecting or discharging the same. There is no authority in this office to accede to the request of Gen. Jones for the release of his real estate, now bound by the levy, nor can the notes be received on that condition, and so it is proper you should inform him." A fourth letter from the Solicitor, dated March 5, 1838, to the same purpose. A fifth letter was dated Feb. 19, 1839. It stated, that the securities of Augustus Jones, had assented to a postponement of the sale of his real estate and negroes, for 3 months, and proceeds: "If in your opinion, no injury will accrue to the U. S. by granting this indulgence to Mr. Jones, you are hereby authorized to suspend proceedings accordingly, upon his paying any costs that may now be due. This, however is not to interfere in any manner with your proceeding to collect the notes given to you by Gen. Jones as collateral security. On the contrary, I have to request you to proceed with these collections, and to deposite the amounts you may receive as promptly as possible to the credit of the Treasurer, &c. Gen. Jones expresses his confident expectation of being able to discharge the whole balance before the present postponement expires, &c." The distress warrant, issued 25th May, 1837, was also included in this rejected evidence, and the levy and return of the Marshal.

The principal, if not the only question, in this case, arises out of the instruction given by the Circuit Court. The plaintiff in error contends, that, inasmuch as by the laws of the United States, the Solicitor of the Treasury had no power to suspend or remove the lien of the distress warrant upon Jones' real estate, the contract was therefore immediately at an end, and Relfe was bound to redeliver the notes upon demand.— This construction of the contract assumes, that the discharge of the lien was the sole consideration of it, and as this consideration failed, *eo instanti* it was made, the defendant had no right to retain the notes. If this were the proper construction of the contract, it would seem remarkable that Jones should have permitted these notes to have remained in the defendant's possession, without demand, for about four years from the date of the receipt. The receipt was given in 1837, and the demand

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*Jones vs. Relfe.*

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by McCabe was made in 1841. But if we are to understand, that the discharge of the lien was the sole and only condition, upon which the notes were to be retained, why did the parties refer the arrangement not only to the approval, but to the *modification* of the Solicitor? Is this expression to be rejected as surplusage? Was there nothing else but the removal of this lien, which could constitute with Jones, any inducement to give up the notes as mere collateral security? That such a modification might be made, we are not compelled to resort to mere conjecture. We refer to the rejected evidence of the plaintiff to show that such a contingency was not beside the contemplation of the parties. In May, 1837, this distress warrant issued against Jones for upwards of \$7,000, which bound all his real estate. In November, 1837, Jones gave these notes to the Marshal, upon the understanding expressed in the receipt. The letters from the Solicitor of the Treasury show, that from this time, (the fall of 1837,) up to 1841, Jones and his friends made repeated applications for a postponement of the sale of his property, both real and personal, and that these applications were successful. As late as February, 1839, we find him assuring the department at Washington, that he confidently expected to be able to discharge the *whole balance* before the last postponement expired. Now it seems from the statement of the Treasurer of the United States, offered in evidence by the plaintiff, that payments had been made by Relfe, on Jones' account, to large amounts, before this last postponement was effected. And it also appears, not only from the statement of Relfe to McCabe, given in evidence by the plaintiff, but also from the return on the distress warrant, also offered in evidence by the same party, that these remittances were chiefly the result of the collection of these very notes, for which an action of trover is now brought. May we not suppose, or rather can we doubt that Jones was aware of these facts, that he knew the defendant was collecting and had been collecting these notes, and that he relied upon them as inducements for urging further postponement? It is not for us to say, that the proof which the plaintiff offered, established all this conclusively. We merely allude to it, as furnishing a reasonable interpretation of the written contract upon which this suit was brought. It shows, as we think, most conclusively, that there might have been other considerations besides the abandonment of the lien upon the land, sufficient to induce Jones to permit the retention of these notes by the United States agents, notwithstanding he had failed in his principal object of getting his lands released from the lien of the distress warrant. Repeated postponements of the sale of his estate, from 1837 to 1841, all of which took



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*Mayo vs. Freeland.*

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place at the urgent solicitation of himself or his friends, may very well be regarded as such a modification of this contract, as was within the contemplation of the parties to it at its inception, and might be assented to and sanctioned by them afterwards.

We have no doubt, that the release of the lands, bound by the distress warrant, was the principle object in view at the time of this arrangement between the plaintiff and defendant. Indeed it is so expressly declared to be. But the possibility of being unable to accomplish this purpose, is also manifestly present to the minds of the contracting parties, and therefore, not only a naked approval of it as it was, is provided for, but modification of it is also contemplated. If the modification entirely defeated the original purpose of Jones, it was his right and his duty to have given notice of this to the Marshal and demanded the notes. But if the modification was really beneficial to him, and it met his approbation and was acquiesced in for years, there could be no ground for maintaining the present action.

The instruction of the Circuit Court was therefore substantially correct. The plaintiff could not maintain his action by merely producing the receipt and proving a demand. It was his duty to have shown, either that this arrangement was entirely rejected by the Treasury department, or was so modified as to defeat all his purposes.

In relation to the refusal of the court to let in the evidence offered by the plaintiff, after he had closed his case, our previous observations in relation to the character of this testimony, are sufficient to show, that there is nothing in the circumstances of this refusal to induce the court to interfere with this exercise of discretionary power, on the part of the Circuit Court.

The other Judges concurring, the judgment is affirmed.

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**MAYO vs. FREELAND.**

The clerk and justices who are required by our election law "to examine and cast up the votes given to each candidate," have no right to go behind the certificates of the judges and clerks of the election—any error in their certificate can only be corrected by the tribunal authorized by law to determine such election when contested.

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*Mayo vs. Freeland.*

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## ERROR to Platte Circuit Court.

STRINGFELLOW, LEONARD & BAY, *for Plaintiff in error, insist:*

1. In an election for clerk, it is the duty of the clerk of the County Court, and not of presiding justice, taking to his assistance two justices of the peace, or of the County Court, to examine, and cast up the votes, determine who is elected, and grant a certificate of the fact. Rev. Statutes, title Elections, § 21; title Clerks, § 8.

2. In determining who is elected, the canvassers are not concluded by the abstract of votes furnished by the poll judges, but in the case of a variance between the abstract of the poll book, as to the number of votes given to a candidate, they must be governed by the poll book. Rev. Stat., title Elections, secs. 13, 20 and 21.

3. Although the canvassers ought to examine the votes publicly in the court house, after public notice, by proclamation at the court house door, this fact need not be inserted in their certificate of the result, nor would the omission to give public notice, annul the certificate.

4. It was the duty of the presiding justice of the County Court, to grant the appellant a certificate of his election, upon the certificate of the canvassers, that he had a plurality of the votes given, and it was not competent for him to look behind the canvassers' certificate and determine for himself the result of the election.

WILSON & REES, *for Defendant in error, insist:*

1. That unless the plaintiff moved the court to set aside the judgment and grant a new trial, or in arrest of judgment, this Court will take it for granted, that the said plaintiff acquiesced in the rendition thereof.

2. That the poll books never were legally cast up by the justice. See the reasons given by the court below. Transcript, p. 14. If so, the justice was right in making the certificate the basis of calculation. Elections, sec. 20, 449, R. S. of 1845.

3. A writ of error will not lie in this case. *Mandamus* is the proper remedy, if any, from this Court. See 1 Mo. Rep., 191, *Astor vs. Chambers*; also *Miller & Irvine vs. Richardson*, 1 Mo. Rep., 310; these cases decide, that there must be a judgment to authorize an appeal or writ of error, a mere order will not do. See also for this, 1 Bibb, 497; 2 Bacon, 452; Coke, 288; 3 Black., 109; 2 Pirtle Digest, 79.

4. *Mandamus* will not lie where there is any other remedy. In this case the only remedy was by contesting the election under the provisions of the statute before the County Court. See Rev. Stat., 202, sec. 8.

5. The writ of *mandamus* was not the proper remedy in this case, where the office sought is held under color of right by a third person. *Quo Warranto* is, if any. See *People vs. Corporation of N. Y.*, 3 Johns. cases, 79; *King vs. Clark*, 1 East., 38; *Angel & Ames on Corporations*, 565; *King vs. Mayor of Colchester*, 2 Durn. & East.; see also, *St. Louis County Court vs. John Sparks*, 10 Mo. Rep., and 8 Pick. Rep., 47.

NAPTON, J., *delivered the opinion of the Court.*

This was a petition for a *mandamus*, upon the defendant in error, who was the presiding justice of the County Court of Platte County, to compel the said justice to give the petitioner a certificate of his election to

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*Mayo vs. Freeland.*

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the office of Clerk of the County Court. The return to the conditional *mandamus* stated, that by the certificate of the judges and clerks of the election, at the various precincts in Plattte county, the petitioner and one Daniel P. Lewis had each 590 votes, and one Peyton R. Waggoner received 559 votes; that in accordance with these returns, the defendant error, reported the vote to the County Court as a tie, between said petitioner and said Lewis, whereupon the County Court selected said Lewis as their clerk. The justice also admitted, that by casting up the votes, as they appeared on the poll books, said petitioner had 593 and said Lewis 591 votes; but he considered himself unauthorized to go behind the certificates of the judges and clerks of the election. Upon this state of facts the peremptory *mandamus* was refused.

The phraseology of our act concerning elections is not very explicit in relation to the powers of the canvassers, in going behind the certificates of the judges and clerks. The 13th section of the act directs, that the judges and clerks shall take an oath for the faithful performance of their respective duties, and the clerks are required faithfully to record the names of all the voters, and distinctly carry out in lines and columns, the name of the person for whom each voter votes. The 20th section directs the judges and clerks to certify under their hands, the number of votes given to each candidate, and to transmit the same, together with one of the poll books, by one of their clerks, to the clerk of the County Court. The 21st section then authorizes the clerk of the County Court and two justices of the peace, or justices of the County Court, "*to examine and cast up the votes given to each candidate, and give to those having the highest number of votes, a certificate of election.*" The only question is, whether this examination and casting up of the votes, here spoken of, is confined to the votes as they are certified by the returns, or whether the canvassers must look into the poll book and review the work of the judges and clerks of the election.

As before observed, the language of this 21st section is not entirely clear, but looking at the scope and spirit of the whole act, we have arrived at the conclusion, that the defendant in error, placed a right construction upon the law.

Whilst it is clear, that the legislature designed that the person having the highest number of votes, should get the certificate of election, we think it is equally manifest, that the judges and clerks of the election, and canvassers were designed to act independently of each other, and that the latter were not entrusted with the power of revising or correcting the acts of the former. In every election, a tribunal has been se-

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*Mayo vs. Freeland.*

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lected to revise the actions of all the officers concerned, and to correct any mistakes or injustice which have been committed. The canvassers do not constitute that tribunal. They are no more likely to avoid error, than the judges and clerks of the election. On the contrary, when we consider the great number of offices which are elective, and which are filled at the same general election, it is apparent, that the officers who are present at, and superintend the election, are much better qualified to cast up the poll books, than those who may not have been present. The judges and clerks have duplicate poll books; if a mistake be committed in one, the addition of the other will be likely to bring it to their notice. If errors be still committed in both, they can be corrected by bringing the matter before the tribunal appointed by law to decide a contested election. The judges and clerks may then be examined, as well as the poll books; the latter may be wrong and the certificates correct; the voters may be examined, if necessary; and in short, mistakes committed by any of the officers, to whom the conduct of the election is entrusted, may then be corrected. But the legislature do not seem to have intended, that one class of ministerial officers should have the power of revising the action of another class. Each acts independently of the other, and there is good reason why it should be so. Each officer or class of officers is then responsible for his own acts, and not for those whose official action has preceded.

We do not perceive that any inconvenience or injustice is likely to result from this construction of the election law. If the canvassers are allowed to disregard the certificate of the judges and clerks and go into an examination of the poll book transmitted to the clerk, without having the other poll book before them, is it not probable that more errors will be committed by them than the officers who were present at the election, and who must be supposed to understand the books made out by themselves? Both classes of officers are liable to commit mistakes. The duty of the canvassers is to cast up the votes as returned by the judges and clerks of each township. The duty of the latter officers, is to keep correct poll books and make correct returns of the votes given in their respective townships. If mistakes be committed by either, there is a remedy. The tribunal appointed by law, to determine contested elections, can correct the errors of the poll books or the returns or the certificates of the canvassers. We do not say that this is the only remedy; but if a mandamus would lie at all, why not let it go against the officers who have committed the errors, rather than against the one who has acted upon the certificates of the others? If the canvassers may correct,

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*The State of Missouri, use of the heirs of M. Duclos, vs. Smith and others.*

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or rather revise the proceedings of the judges and clerks, why may not the presiding justice of the County Court, to whom the canvassers report, be warranted in revising the acts of the canvassers, and in so doing determine in favor of the certificates made by the judges and clerks? It is better policy, in our opinion, and more in conformity to the spirit of our election law, to let each class of officers act independently of the other, with a power in a superintending judicial tribunal, (it will be judicial at least *pro hac vice*,) to correct the errors of all or any of them.

Judgment affirmed.

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THE STATE OF MISSOURI USE OF THE HEIRS OF M. DUCLOS, vs. SMITH AND OTHERS.

APPEAL from Washington Circuit Court.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of debt brought upon the bond of W. W. Smith and his securities, Roberts & Belknap, for the due administration of the estate of Michael Duclos, deceased. The suit was instituted in the name of the State, at the relation and to the use of Mary Duclos and others, heirs and widow of said M. Duclos, deceased. The declaration was demurred to, and the demurrer sustained. From the judgment of the Circuit Court on the demurrer, an appeal was taken.

The only question to be determined by this Court, is the sufficiency of the declaration. The appellee not having appeared in this Court, and it not having been suggested, on what ground the demurrer was sustained, a careful examination of the declaration itself has not enabled us to discover any defect. It appears to be in the usual form, and it is deemed unnecessary to copy it.

The judgment will be reversed and the cause remanded.

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*Vossel vs. Cole.*

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## VOSSEL vs. COLE.

1. A mother cannot maintain an action for the seduction of her daughter, where such seduction occurred during the life of the father, although the birth of the child occurred after the death of the father.
2. A parent may maintain an action for the seduction of a daughter over the age of twenty-one years—but in such case there must be some actual service rendered by the daughter. The very slightest acts of service will however be sufficient.
3. The connivance of the parent will bar an action.

## ERROR to St. Charles Circuit Court.

NAPTON, J., *delivered the opinion of the Court.*

Catherine Vossel brought an action on the case against the appellee, Cole, for debauching her daughter, Clara Maria, whereby she lost her services and society, and was subjected to expense during the pregnancy of her said daughter, &c. The defendant pleaded five pleas. 1. Not guilty. 2. That at the time the plaintiff's daughter became pregnant, the said plaintiff was living with her husband, then in full life and the head of the family. 3. That at the time the plaintiff's daughter became pregnant, said daughter, was not the servant of her mother, but was over twenty-one years of age, and was then and there living and cohabiting with one Frederick Klote, &c. 4. That during all the period of time in the plaintiff's declaration mentioned, the plaintiff's daughter was of full age and mistress of her own time and conduct; that she only occasionally visited her mother; that she was notoriously in habits of sexual intercourse with any person of the male sex, &c., and that this conduct was encouraged and sanctioned by her mother. 5. That before plaintiff's daughter was gotten with child, it was understood by plaintiff, that defendant was a bachelor, of good moral character, and handsome property, but of strong passions, &c.; that it was therefore contrived between plaintiff and her daughter, that the daughter should throw herself in defendant's way, with a view to the result which happened, &c., &c., intending to make a speculation thereby, &c.

To the four last pleas, the defendant filed a general demurrer. The demurrer was overruled and judgment given on the demurrer.

The second plea presents the question, whether the mother can main-

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*Vossell vs. Cole.*

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tain this action, where the seduction occurred during the life of the father. In New York some of the decisions seem to determine this question affirmatively. In *Sargent vs. Dennison*, (5 Cowen, 106,) a widow had bound out her daughter as an apprentice, and whilst out at service, the daughter was seduced, upon which, the indentures were cancelled and the daughter returned to the mother's house and lay in there. The court held, that the action was well brought by the mother. It was conceded, that trespass could not have been sustained, but it was said that in the action on the case, it was not material who was entitled to the services of the female at the time of the seduction, and that the only enquiry was, upon whom the consequential injury had fallen. The same doctrine is maintained in *Van Horn vs. Freeman*, 1 Halst. R., 322, and *Coon vs. Moffat*, 2 Penn. R., 583. In *Logan vs. Murray*, (6 Serg. and Rawl., 175,) the contrary was maintained. That was an action of trespass, and it appears that the daughter was living with her father when she was debauched, and after his death continued to reside with the mother, who brought this action. The court held, that the alleged trespass, having been committed upon the father, its consequences could not give a cause of action to the mother. Between the mother and the daughter, at the time of the trespass, the relation of master and servant did not exist.

These cases are not easily reconciled, though the action in Pennsylvania was trespass and those upon which the Supreme Court of New York decided, were upon the case. This action for seduction, in whatever form it may be brought, is founded upon the supposed loss of service by the plaintiff, and it must of course be alleged and proved that the relation of master and servant existed when the injury was committed. It is so averred in the declaration in this case, 2 Chit. Pl., 643. The plea avers a state of facts, which shows that this relation did not exist at the time of the trespass. If the father was entitled to the action, when the illegal act was done, how can the mother maintain an action for the consequences of that act? The action either died with the father or survived to his representatives. It certainly did not survive to the mother.

This action can only be sustained upon the idea, that the pregnancy and consequent expense and loss of service, constitute a distinct ground of action, exclusive of the original trespass. If so, it is an anomaly in the law. When the seduction occurred, the father could have brought trespass, or if he had lived until after the confinement and illness of his daughter, he could have brought case. His death must either have extinguished this right of action, or it must pass to his personal representatives.

*John Long vs. Elizabeth Story.*

The apparent hardship of leaving the mother remediless, notwithstanding all the expense and trouble has fallen upon her, is only what may occur in numerous other instances where personal actions die with the person.

The third plea is bad. Where the daughter is over twenty-one years of age, there must exist some kind of service to entitle the parent to sue, but the slightest acts have been held to constitute the relation of master and servant. The cohabitation with Klote charged in this plea, is not stated to have occurred elsewhere than under the roof of the plaintiff. *Martin vs. Payne*, 4 Johns. R., 175; *Hornketh vs. Barr*, 8 S. & R., 36; *Applegate vs. Ruke*, 2 Marsh. R., 127.

The fourth plea sets up a variety of matters, distinct in their character; first, that the daughter was over age; second, that she only occasionally visited her mother; thirdly, that her habits were bad; fourth, that her mother connived at her incontinence. It is hardly necessary to add that this plea is bad.

The fifth plea seems designed to retaliate the charge of seduction upon the plaintiff and her daughter. There is no doubt that the connivance and consent of the parent is a bar to this action. *Eager vs. Stigeland*, 2 Caine's R., 218. But this plea is not so framed as to place this issue before the jury.

Judgment affirmed.

## JOHN LONG vs. ELIZABETH STORY.

1. One partner can not, after dissolution of the partnership, make a note in the name of the firm, even in renewal of a note of the firm, so as to bind the other members, without special authority. A general authority to settle the business of the firm does not give such power.

2. To release the other partners in such case, it must be shewn that the payee of the note had notice of such dissolution.

## APPEAL from Clay Circuit Court.

**WILSON & REES, for Appellant, insist:**

1. The defendant insists upon a reversal of the judgment of the Circuit Court,

First, Because the verdict is contrary to law and evidence, (the note sued on not having been

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*John Long vs. Elizabeth Story.*

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read to the jury) without which there is no evidence to support the verdict of the jury.

Second. Because the court below erred in giving the 2nd instruction. See 2 McCord's Rep., 379; Gow, 242.

Third. Because the court below erred in giving the other five instructions, and more particularly the 4th instruction, (marked 3rd in transcript.) See Gow, 250-1; 13 Ver. Rep., 522, Hackney, &c. vs. Patrick; 3 J. R., 536; 2 J. R., 300; Malden vs. Sherburn, 15 J. R., 409; Hopkins vs. Bank, 7 Cow., 57; Baker vs. Stackpole, 9 Cow., 420; Hammon vs. Huntley, 4 Cow., 493; 6 J. R., 266; Brady, &c. vs. Hill & Rees, 1 Mo. R., 225; 1 McCord's Rep., 388; Bell vs. Morrison, 1 Peters, 370-1.

*HAYDEN, for Appellee, insists :*

That the court did not err in giving to the jury the instructions prayed for by the plaintiff, nor in overruling the motions for a new trial and in arrest of the judgment, made by the defendant.

*NAPTON, J., delivered the opinion of the Court.*

Elizabeth Story, the surviving administratrix of the estate of Smith Story, deceased, brought an action of assumpsit against John and Ja's H. Long. The declaration contained two counts; one founded on a note dated 3rd May, 1841, signed "J. & J. Long," for the payment to plaintiff and one Croysdale, as the legal representatives of said Story, the sum of \$564 44, for value received, with ten per cent. interest one day after the date thereof; the other count being for money lent and advanced, &c. The defendant, John Long, (the suit having been discontinued as to James H.) filed three pleas, non-assumpsit, the statute of limitations, and a plea that the defendant did not execute the note in the first count mentioned. Upon the trial, the plaintiff produced a witness who testified that the note sued on and in evidence was in the hand writing of James H. Long; that he was present when the note was given; that it was given by way of renewal of a former note of the firm of J. & J. Long, and embraced the amount of principal and interest on the old note up to that date; that the old note was given shortly after James H. and John Long commenced mercantile business as partners; that said James H. and John continued their mercantile business until about the year 1839 or 1840, when they dissolved; that John Long was a farmer living in Clay county, and his son, James H., was the acting member of the firm, and wound up the business after its dissolution. The witness further stated, that the old note was given on the credit of the firm for money borrowed, and was signed by James H. in the firm style of "J. & J. Long;" that witness was sent by the administrators (of whom the plaintiff was one) to John Long to request him to come to town and renew the note; that he called on

*John Long vs. Elizabeth Story.*

The apparent hardship of leaving the mother remediless, notwithstanding all the expense and trouble has fallen upon her, is only what may occur in numerous other instances where personal actions die with the person.

The third plea is bad. Where the daughter is over twenty-one years of age, there must exist some kind of service to entitle the parent to sue, but the slightest acts have been held to constitute the relation of master and servant. The cohabitation with Klote charged in this plea, is not stated to have occurred elsewhere than under the roof of the plaintiff. *Martin vs. Payne*, 4 Johns. R., 175; *Hornketh vs. Barr*, 8 S. & R., 36; *Applegate vs. Ruke*, 2 Marsh. R., 127.

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Judgment affirmed.

JOHN LONG vs. ELIZABETH STORY.

1. One partner can not, after dissolution of the partnership, make a note in the name of the firm, even in renewal of a note of the firm, so as to bind the other members, without special authority. A general authority to settle the business of the firm does not give such power.
2. To release the other partners in such case, it must be shewn that the payee of the note had notice of such dissolution.

APPEAL from Clay Circuit Court.

**WILSON & REES, for Appellant, insist:**

1. The defendant insists upon a reversal of the judgment of the Circuit Court,  
First, Because the verdict is contrary to law and evidence, (the note sued on not having been



*John Long vs. Elizabeth Story.*

read to the jury) without which there is no evidence to support the verdict of the jury.

Second. Because the court below erred in giving the 2nd instruction. See 2 McCord's Rep., 379; Gow, 242.

Third. Because the court below erred in giving the other five instructions, and more particularly the 4th instruction, (marked 3rd in transcript.) See Gow, 250-J; 13 Ver. Rep., 522, Hackney, &c. vs. Patrick; 3 J. R., 536; 2 J. R., 300; Malden vs. Sherburn, 15 J. R., 409; Hopkins vs. Bank, 7 Cow., 57; Baker vs. Stackpole, 9 Cow., 420; Hammon vs. Huntley, 4 Cow., 493; 6 J. R., 266; Brady, &c. vs. Hill & Rees, 1 Mo. R., 225; 1 McCord's Rep., 388; Bell vs. Morrison, 1 Peters, 370-1.

*HAYDEN, for Appellee, insists :*

That the court did not err in giving to the jury the instructions prayed for by the plaintiff, nor in overruling the motions for a new trial and in arrest of the judgment, made by the defendant.

*NAPTON, J., delivered the opinion of the Court.*

Elizabeth Story, the surviving administratrix of the estate of Smith Story, deceased, brought an action of assumpsit against John and Ja's H. Long. The declaration contained two counts; one founded on a note dated 3rd May, 1841, signed "J. & J. Long," for the payment to plaintiff and one Croysdale, as the legal representatives of said Story, the sum of \$564 44, for value received, with ten per cent. interest one day after the date thereof; the other count being for money lent and advanced, &c. The defendant, John Long, (the suit having been discontinued as to James H.) filed three pleas, non-assumpsit, the statute of limitations, and a plea that the defendant did not execute the note in the first count mentioned. Upon the trial, the plaintiff produced a witness who testified that the note sued on and in evidence was in the hand writing of James H. Long; that he was present when the note was given; that it was given by way of renewal of a former note of the firm of J. & J. Long, and embraced the amount of principal and interest on the old note up to that date; that the old note was given shortly after James H. and John Long commenced mercantile business as partners; that said James H. and John continued their mercantile business until about the year 1839 or 1840, when they dissolved; that John Long was a farmer living in Clay county, and his son, James H., was the acting member of the firm, and wound up the business after its dissolution. The witness further stated, that the old note was given on the credit of the firm for money borrowed, and was signed by James H. in the firm style of "J. & J. Long;" that witness was sent by the administrators (of whom the plaintiff was one) to John Long to request him to come to town and renew the note; that he called on

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John, who at first objected, supposing the note was given for a negro girl bought by James H., but upon being satisfied by witness of his mistake in this particular, he told witness it was unnecessary for him to go to town, that James H. had authority to sign for both, and if he signed, it would be all right; that upon witness's return to town, James H. gave the note sued on. James H. Long was the son-in-law of Smith Story, deceased, and the witness lived in the family of said Story, and supposes the dissolution of the partnership of the Longs was known to plaintiff.

The defendant introduced several witnesses for the purpose of establishing the time of the dissolution of the partnership between John and J. H. Long, and to show the probable knowledge of that fact by plaintiff. One witness deposed that, according to his recollection, John and James H. dissolved partnership in 1838. Another witness stated that the partnership was dissolved on the 30th November, 1837; which fact he recollected from seeing the inventory made at the dissolution, and from the statements of both parties. In February, 1838, this witness and Willis Long entered into partnership with John Long, and this fact confirmed the witness in his belief that the dissolution of the firm of "J. & J. Long" took place in the fall of 1837. The sign of "J. & J. Long" continued over the door of the house, where James H. Long continued business on his own account, until 1839 or 1840. The witness did not know that any advertisement of the dissolution was ever published, but believes every one in the neighborhood knew the fact. Another witness, Willis Long, testified to about the same facts as the preceding.

The court, after the close of the evidence, gave all the instructions asked by either side, which were as follows:

Instructions for plaintiff:

1. If the jury believe from the evidence that the note sued on was executed for money which the firm of John and James Long had borrowed from Smith Story, in his lifetime; that a note had been given for the money when borrowed in the name of the firm, and that said note was renewed subsequently to the dissolution of said firm by James H. Long, who signed the firm name thereto, they will find for the plaintiff, unless they shall further believe from the testimony that Elizabeth Story, the plaintiff in this action, had actual notice of the dissolution of said firm at the time said note was so rendered.

2. In order to bind the plaintiff in this case, by notice, it devolves on the defendant to show that the firm, or some member thereof, had given the plaintiff notice of the dissolution, at or before the time of renewal of the note, or that the plaintiff had actual notice.

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*John Long vs. Elizabeth Story.*

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3. If the jury believe from the testimony that James H. Long was the active business member of the firm of John and James Long, and was settling up the business of the firm, he had the authority to bind the firm, even subsequent to the dissolution, in settling up the business of the firm.

4. That if the jury believe from the evidence that the note sued on was executed for money which the firm of John and James Long had borrowed from Smith Story, in his lifetime; that the money was borrowed when the firm was engaged in business and before the dissolution thereof, and for the use of the firm in carrying on its regular business, a note having been given by the firm at the time the money was so borrowed; and the note sued on was given at the date thereof, by way of renewal, for the principal and interest then due on the old note, and the old note cancelled and given up to J. H. Long; and they further find that James H. Long was the actual and business member of the firm, before the dissolution of the firm, and after wards in winding up its business, they must find for the plaintiff, although they may believe the firm was dissolved at the time the note sued on was given, and although they may further believe it was signed in the firm name by the said James H. Long.

5. If they find from the evidence that the consideration of the note sued on was money borrowed for the use of the firm of J. & J. Long, before the dissolution of said firm, and after dissolution the note sued on was signed in the firm name by James H. Long, the active member of said firm, they must find for the plaintiff: if they further find that the defendant, John Long, was a member of said firm, and as such member, told the agent of the plaintiff that said James H. Long had authority to sign the note in the name of the firm, and if he so signed it, it would be all right as though he should sign it himself.

6. That the affidavit of the defendant to his third plea is not evidence before them, and is not to be so regarded or taken.

Instructions for defendant:

1. The defendant, John Long, moved the court to instruct the jury, that if they believe from the testimony that the note in question was executed by James H. Long, one of the partners, without the knowledge or consent of the other partner, John Long, after a dissolution of the partnership of J. & J. Long, they will find for defendant.

2. The defendant moves the court to exclude from the jury all the evidence given by George Story prior to the execution of the release.

The plaintiff had a verdict and judgment. A motion for a new trial

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*Springer vs. Cabell.*

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was made and overruled, and exceptions taken to the several opinions of the court.

The only question which the record presents, is the propriety of the instructions given by the Circuit Court. The principle is well established, that after the dissolution of a partnership, one partner cannot bind the other by drawing a note in the partnership name, unless he has a particular power vested in him for that purpose. A general authority to settle the partnership concerns, does not create such a power. *Bank of South Carolina vs. Humphreys*, 1 McCord R., 389; *Martin vs. Walton*, 1 McCord, 18; *Whitman vs. Leonard*, 3 Pick., 177; *Whittaker vs. Brown*, 10 Wend., 75; *Sanford vs. Mickels & Forman*, 4 Johns. R., 224. A portion of the instructions given by the Circuit Court clearly recognize these principles; but the third and fourth seem to place the liability of the defendant on entirely different grounds. The fifth instruction was a correct exposition of the law applicable to the facts proved, and had this instruction been unaccompanied with the third and fourth, we should not be under the necessity of disturbing the judgment. Had these instructions (the third and fourth) been mere abstractions, inapplicable to any proof given on the trial, we might have disregarded them; but as they relieved the plaintiff from all proof of any special authority on the part of John Long, notwithstanding the dissolution of the firm of "J. & J. Long" may have been known to the plaintiff, we cannot undertake to say but that the verdict was obtained in consequence of these instructions.

The other Judges concurring, the judgment is reversed and the cause remanded.

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SPRINGER vs. CABELL.

One partner cannot sue another at law for any matter connected with the partnership business, until a settlement of the partnership.

ERROR to Chariton Circuit Court.

DAVIS, for Plaintiff in error, insists:

That upon the evidence no recovery can be had by Cabell; he being the partner of plaintiff, in the purchase and sale of lands for a term of five years, when the money was advanced, spoken of by the witness. See 5 Mo. Rep., 112.

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That when the case was submitted to the Circuit Court, it ought to have found the issue, either for plaintiff or defendant, before making an order, or judgment, as in case a jury had been empanelled.

*ABELL, for Defendant in error:*

1. The letter introduced by plaintiff, and objected to by defendant, was properly admitted as evidence, tending to prove defendant's indebtedness; but if it was improperly admitted, defendant waived it, in not moving for a new trial on that ground.

2. The instruction asked, was properly refused. It asked the court to withdraw from the jury the whole case, when the facts to be determined, were proper for the consideration of the jury. *Hughes vs. Ellison*, 5 Mo Rep., 110.

3. If the instruction asked, was properly refused, and the objection to the evidence in the letter waived, then the court was called on to decide no other point of law, until after the verdict; and after verdict it is too late to raise an objection, that the subject matter of the suit was a partnership transaction. See *Smith vs. Allen*, 18 J. R., 245; *Waldo vs. Russell*, 5 Mo. R., 387.

4. If a partnership in land can be formed, it must be in writing, or it cannot be enforced; it is within the statute of frauds. But it is contended, that a partnership cannot be formed in land, subjected to all the rules of law, governing ordinary partnerships. See *Baker vs. Wheeler*, 8 Wend., 505; *Coles vs. Coles*, 15 J. R., 159 and 160. But if such a partnership could be made, in this case only one matter was to be settled between the parties, and the matter can be settled at law. See *Musier vs. Trombour*, 5 Wend., 274; 8 Mo. Rep., 574; *Byrd vs. Fox*.

5. In this case, the most that can be contended for, is that there was a verbal agreement between the parties to form a partnership in land, which was to be reduced to writing by them. The verbal agreement was wholly rescinded by the act of defendant, in refusing to execute the written agreement. But before the whole matter was rescinded, one advances to the other money for a specific purpose, which he misapplies and converts to his own use;—whether partners or otherwise, damages can be recovered in a suit at law for the money, &c. See *Gow on Partnership*, 75 and 76; *Dunham vs. Gillis*, 8 Mass., 462; *Thomas vs. Pyke*, 4 Bibb, 418; *Byrd vs. Fox*, 8 Mo., 574.

*NAPTON, J., delivered the opinion of the Court.*

Cabell brought an action of assumpsit against Springer, the declaration containing one general count for work and labor, money lent, &c. The general issue was pleaded. The cause was submitted to the Circuit Court. The plaintiff read in evidence a letter from Springer, dated St. Louis, Dec. 10, 1844, in which he told plaintiff, that if he continued his suit against him, he would never pay him one cent, but if he would withdraw it, he would get him a tract of land worth government price. Charles Cabell, a witness for the plaintiff, testified, that he was present at a conversation between plaintiff and defendant, from which he learned, that they had entered into an agreement to be partners for the term of five years, in the buying and selling of lands; that they were to be equally interested in the profits and losses attending said business; that



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in pursuance of this agreement they took a trip to Virginia; that during said trip, plaintiff advanced to defendant some money to purchase a tract of land in Chariton county, near Brunswick; that this land was to be purchased in the name of the plaintiff; that defendant had purchased the land with his horse, saddle and bridle, and the money advanced by plaintiff, and had taken the deed to Abraham Springer, a brother of defendant; that the consideration for the land was estimated at about \$150, or \$160. At the time of this conversation, the witness and plaintiff had prepared a written agreement to be signed by plaintiff and defendant, containing as the witness understood, the substance of the verbal agreement made before the Virginia trip; but the defendant refused to sign the same, giving as a reason therefor, that the plaintiff was embarrassed in his pecuniary affairs, and that this circumstance would operate against him, (defendant,) in the land business. This witness further stated, that he learned from some conversation between the parties, that plaintiff had advanced a horse to defendant during the time of their absence in Virginia, and that defendant had exchanged that horse for a tract of land in Chariton county. The original agreement between these parties, the witness thought, was made as early as 1843. Another witness testified, that he had heard defendant admit, that he had received some money from plaintiff, and that with the money so received, and his own horse, saddle and bridle, he had purchased the tract of land near Brunswick; that the whole consideration for said tract was between \$120 and \$150; that he also heard defendant say, that he and plaintiff were in partnership in the purchase of said land.

This was all the evidence offered, and upon this state of facts, the defendant called upon the court to decide that the plaintiff could not recover. But the court found a verdict for the plaintiff for \$148, and gave judgment for the same.

It was determined by this Court, in the case of *Stotherts vs. Knox*, (5 Mo. R., 112,) that one partner cannot maintain assumpsit against another, whilst the partnership concerns remain unadjusted. The case of *Byrd vs. Fox*, (8 Mo. R., 574,) is only an exception to this general principle, in which the reason whereon the rule was founded, could have no operation. In the present case, all the transactions between the parties upon which this suit is sought to be maintained, grew out of the partnership for five years, in which both plaintiff and defendant were to share equally the profits and losses. It does not appear whether the speculations were profitable or worthless, and the verdict of the Circuit Court appears to be simply for the return of the money supposed to have been

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*Maddin's adm'rs. vs. Edmonson, adm'r. of Field.*


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advanced by one partner, without any regard to the results of the speculation in which it was invested. Such a verdict must be manifestly unjust to the plaintiff, if the lands purchased with the partnership money have proved greatly more valuable than the consideration given, and the verdict would not do less injustice to the defendant, if, on the other hand, these lands turned out to be valueless. Hence the propriety of settling these unadjusted partnership transactions in another forum.

Judgment reversed.

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MADDIN'S ADM'RS. VS. EDMONDSON, ADM'R. OF FIELD.

1. A bond given by one of two persons for a joint liability, will not extinguish the simple contract debt, unless given at the time the liability occurred, or accepted in satisfaction of the simple contract.
2. A verbal message delivered by a slave is not evidence against his master, unless it be shewn that the master acted upon or recognized such message.

APPEAL to St. Genevieve Circuit Court.

*FRISSELL, for Plaintiffs in error, insists :*

1. That the bond executed by Malachi Maddin, in favor of Maria Field (being a security of a higher nature than the account) merged the account.
2. That the court erred in permitting hearsay testimony, and that being a statement of a slave, to go to the jury.
3. That the court permitted the jury, in their retirement to consider of their verdict, to take with them written statements of the plaintiffs below, which would be liable to influence their decision and mislead them.
4. That the court refused to give to the jury legal and proper instructions prayed for by the plaintiffs in error.
5. First, That the court gave the jury, on behalf of the plaintiffs, illegal instructions, and such as had a tendency to mislead them. Second. That the court gave the jury instructions not warranted by the facts proved in the case.
6. Allowing the copartnership proved in full, neither the court or jury should have allowed interest on the account against Richard Maddin's estate.

*LEONARD & BAY, for Defendants in error, insist :*

1. Taking the bond of Malachi Maddin did not operate as an extinguishment of the original

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debt. This can only take place where the separate bond or other security of one joint debtor is taken in discharge of the joint indebtedness. Where the transaction shows such to be the intention of the parties, the joint indebtedness is extinguished, but not otherwise. Story on Partnership, 524-4-5; Steamboat Charlotte vs. Hammond, 9 Mo. R., 60; Gow on Partnership, 282.

2. The instructions given on the part of the plaintiff below contain a correct exposition of the law applicable to the facts in evidence. Bracken vs. March, 4 Mo. R., 74; King vs. Ham, 4 Mo. R., 275; Story on Partnership, p. 159, 82.

3. The instructions asked by the defendant below were properly refused. The question was not whether Malachi and Richard Maddin were partners in the hiring of the negro, but whether the negro was hired to both or either on their joint credit; and this was a question for the jury to determine on the evidence. Evidence that the negro was hired for the purpose of working in a business in which they were engaged as partners, or jointly concerned, together with the admissions of Richard Maddin, conduced to establish the fact that the hiring was for their mutual benefit, and that the credit was given to both. The second instruction was a mere abstract proposition, which might or might not be true, according to circumstances.

4. The evidence of Thomas Horine, objected to by the defendant below, was not in the nature of *hearsay* evidence, but the statement of a fact, viz: that the negro of Richard Maddin came to the house of Horine with a verbal message from his master Richard. The defendant should have stated the nature of his objection to this evidence. Jackson vs. Hobby, 20 J. R., p. 362.

5. There was nothing improper in permitting the jury to take to their room the plaintiff's account. It is a matter of universal practice in the Circuit Courts to permit the jury to take the declaration or account of the plaintiff, in order to ascertain the nature and character of the demand. The other matter on the back of the account was expressly excluded from the consideration of the jury.

6. Interest is recoverable on contracts for the payment of money, from the time when the principle ought to have been paid. Williams vs. Sherman, 7 Wend., 109.

NAPTON, J., *delivered the opinion of the Court.*

Edmondson, the administrator of the estate of Maria Field, deceased, presented to the County Court of St. Genevieve county an account against the estate of Richard Maddin, for the hire of a slave. The County Court refused to allow the account, and the case was taken to the Circuit Court by appeal. Upon the trial in the Circuit Court, the plaintiff was permitted to prove by Thomas Horine that he was Mrs. Field's agent; and that during the year 1842, a negro boy, named Smith, came to his house with a verbal message from his master, wanting to know if witness had any hands to hire; and that he sent word by the boy to him that he would let him have Mrs. Field's boy Mace, for a year, at \$145. This testimony was objected to, but upon an assurance from counsel that the plaintiff expected further to prove that Malachi Maddin had subsequently got the negro, and Richard Maddin had acknowledged his indebtedness for his hire, the testimony was admitted. This witness then proceeded to state, that some weeks after this verbal message, Malachi Maddin came down to his house and agreed to give the sum he ask-

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ed for Mace, and told witness that his brother Richard would settle it; that he did not see Richard until some five or six months thereafter, when he informed him that Mrs. Field had written to him for money. Richard remarked to him that the price of lead was low, and it was ruinous to sell at the price. About the expiration of the year for which Mace was hired, the witness again saw Richard Maddin, and dunned him for the money. Richard said he would see the first money made at the mine applied to the settlement of this demand. The witness further stated, that when he was at the mines, he took the bond of Malachi Maddin for the hire, with a blank left for Richard to sign, but that Richard died before he returned home from the mines, or within a day or two afterwards, and he was consequently prevented from obtaining his signature. Malachi Maddin, at the time of the hiring, was insolvent.

There was evidence given in relation to the supposed partnership between Richard and Malachi Maddin. It appeared that they worked together some mineral ground at Valle's Mines, having in their employment several hands. The work was principally superintended by Malachi and Thomas Maddin, but occasionally visited by Richard. The mineral raised was credited to their joint account, and the lead purchased by them was charged to their joint account, and the tools used were paid out of the joint proceeds.

The defendant, in support of his motion to exclude the testimony given by the plaintiff, on the ground that the simple contract was merged in the bond taken, offered in evidence the bond given by Malachi Maddin, which was as follows :

"We, or either of us, promise to pay Mrs. Maria Field, or agent, the sum of one hundred and forty-five dollars, for value received, and to pay six per cent. interest on said amount from the 25th day of November, 1842. Witness our hands and seals this 9th of November, 1843.

[Seal]

MALACHI MADDIN. [Seal]"

Immediately beneath this bond, was the following writing:

"The above debt was created by Richard and Malachi, having hired of T. M. Horine, agent of Mrs. Field, a certain negro boy by the name of Mace, which boy was used for our use and benefit, in the mines at Valle's Mines, and I consider we are both equally bound to pay.

MALACHI MADDIN."

The court gave the following instructions to the jury :

1. "That if the jury believe that Malachi Maddin and Richard Mad-

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din were in partnership in the mining business, and that the negro was hired for, and worked for the firm, then they must find for the plaintiff.

2. If the jury believe the negro was hired on the credit of the firm, and worked for the firm, and that the proceeds of his labor went to the use of the firm, then they must find for the plaintiff.

3. That the declarations, acts and admissions of Richard Maddin, are evidence of partnership.

4. That the declarations of one member of the firm, after the existence of the firm is proved, is evidence to bind the firm.

6. That if they believe that Richard Maddin was a partner of Malachi Maddin at the time the negro was hired and performed the work, then Richard Maddin is bound for the wages, either jointly or severally.

7. In suits by strangers against persons charging them as partners, it is not necessary to prove an actual partnership, but only to fix a liability; for a man may not be a *partner* in fact, yet, by his acts and language, he may render himself liable as a partner.

8. To fix a liability in such a case, it is requisite to prove that they held themselves out to the public as partners, or permitted their names to be used before the public as partners.

9. The declarations and acts of Malachi Maddin are not evidence of partnership, unless Richard Maddin knew of it, and permitted his name to be thus used.

10. A bare consent of the defendants intestate is sufficient to establish a partnership, and such assent may be implied from his acts and declarations."

The defendant asked the following instructions, which were refused:

"Unless the jury believe from the evidence that Richard Maddin and Malachi Maddin were partners in the hiring of the negro, they must find for the defendant, unless they should also find that the said Richard promised in writing to Mrs. Field to pay her the hire.

That the joint owners of a tract of land, or of a lead of mineral, are not necessarily partners, though they work the land or lead of mineral jointly, and at joint expense."

A verdict and judgment was given for the plaintiff, Edmondson. An unsuccessful motion to set the same aside having been made in the Circuit Court, the case is brought to this Court by writ of error.

It is undoubtedly true, that a bond taken by a creditor from his debtor is considered as an extinguishment of the demand which previously existed only by simple contract. *Vaughn vs. Linn*, 9 Mo. R., 770. But the



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*Nelson vs. Musgrave.*

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principle can have no application to a case where the circumstances attending the transaction would show that such a construction would be a complete perversion of the intention of both creditor and debtor. How can the bond of Malachi Maddin be considered an extinction of a demand against Richard Maddin, unless the bond was given when the demand first accrued, or was accepted in satisfaction of it? Whether the bond in this case was accepted by Mrs. Field or her agent, as a satisfaction of the demand claimed against Richard Maddin, was a question for the jury to determine, and was properly so considered by the Circuit Court on the trial.

To the instructions of the Circuit Court, in relation to the supposed partnership between Richard and Malachi Maddin, we see no objection.

We think, however, that the court should not have permitted the statement of the witness, Horine, of the conversation between the witness and the servant of Richard Maddin. This testimony, if the jury were permitted to infer that Richard Maddin authorized the message of his servant, upon which hypothesis alone it was admissible, must have been conclusive in fixing the liability of Richard. Indeed, the Circuit Court seemed to consider the testimony illegal, unless there was subsequent proof that Richard Maddin recognized the agency of his servant in this matter. But no such proof was offered. Subsequent conversations between Richard Maddin and the witness, Horine, the object of which was to show a recognition by Richard of his responsibility for the hire of Mace, were given in evidence, and were legitimate evidence for the purpose designed, and may have been satisfactory to the jury, apart from the verbal message of Smith to Horine. But in none of these conversations was any allusion made to the message brought by Richard's servant, nor was any proof offered to show that Richard ever authorized his servant to carry any such message. This Court cannot undertake to say how much influence this illegal testimony may have had in determining the verdict.

The judgment will therefore be reversed and the cause remanded.

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*Nelson vs. Musgrave.*

**NELSON vs. MUSGRAVE.**

1. It is a libel to write of a person that "he is thought no more of than a horse-thief and a counterfeiter."

2. A plea of justification must aver that the plaintiff had committed the offences of horse stealing and counterfeiting. It is not sufficient to aver in such plea that he "was thought no more of than a horse-thief," &c.

3. Such matter might go in mitigation.

**APPEAL from Pulaski Circuit Court.**

**LEONARD & BAY, for Appellant,**

1. If the demurrer to the defendant's special plea was sustained, judgment should have been rendered for him, as the declaration does not contain any cause of action.

2. If the demurrer was overruled, the plea stood unanswered, and judgment of *non pros* should have been entered against the plaintiff; at all events if the court should presume that the demurrer was overruled, it is evident that it was improperly overruled, as the declaration is bad.

**STRINGFELLOW & ANGNEY, for Appellee.**

1. The plea is bad. This will not be denied.

2. The declaration is sufficient, the letter being libellous.

**NAPTON, J., delivered the opinion of the Court.**

This was an action for a libel, alleged to have been written by Nelson, in a letter addressed to some one in the State of Tennessee. The libellous words charged, were as follows: "He (the plaintiff,) is thought no more of than a counterfeiter, a horse thief, a liar and a false swearer; he keeps bad company; he has no neighbors here. I have his character from Illinois in black and white, assigned by thirty-one good citizens that knew him in that country, and could of had a hundred, and is worse there than here if possible."

The defendant pleaded not guilty, and a special plea of justification.—The special plea affirms the truth of the alleged libellous matter in the language of the declaration, averring, that at the time of writing of said letter, &c., the plaintiff was not thought any more of than a counterfeiter, &c.; that he, the said plaintiff, did keep bad company; that he had no neighbors, &c., &c.

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*Nelson vs. Musgrave.*

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To this plea a demurrer was filed, but the record shows no disposition of it. The parties went to trial and a verdict for fifty dollars was had for the plaintiff and a judgment accordingly. To reverse this judgment the case is brought here.

The only question which can arise on the record is the sufficiency of the declaration. If the declaration be good, it is clear that the plea is insufficient. To say of a person that he is no more thought of than a counterfeiter, a horse thief, &c., would seem to be but a circumlocutory insinuation that he is a horse thief and a counterfeiter, and the only justification of such a libel, must be the commission of those offences by the individual charged. The plea merely amounts to the assertion, that others besides the writer of the libel, entertain the same unfavorable opinion of the defendant, and this fact, though it might mitigate the damages, could not amount to a justification.

It is however contended, that the words charged are not libellous, and the argument is based upon the idea, that *words* of a similar import, when spoken, could not be actionable. But the rule which prevails in relation to oral slander, is not applicable to actions for libel. Words, to be actionable, when spoken of a person not in any office, trade or profession, must imply the imputation of an offence, which would subject the offender to some infamous punishment. On the other hand, a libel is defined by Judge Parsons, (*Commonwealth vs. Clapp*, 4 Mass. Rep., 168,) to be "a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." In *McCorkle vs. Burris*, (5 Binn. Rep., 349,) C. J. Tilghman said that "any malicious printed slander, which tends to expose a man to ridicule, contempt, hatred or degradation, is a libel." This definition is not the less applicable, when the suit is brought by the party injured, than when a public prosecution is instituted. *Stow vs. Converse*, 3 Con. Rep., 341; *Clark vs. Binney*, 2 Pick. Rep., 115; *Southwick vs. Stevens*, 10 Johns. Rep., 443; *Steele vs. Southwick*, 9 Johns. Rep., 214; *Thomas vs. Crosswell*, 7 Johns. Rep., 264; *Walker vs. Winn*, 8 Mass. Rep., 248.

Judgment affirmed.

*County of Lewis vs. Tate.*

COUNTY OF LEWIS vs. TATE.

A collector, who has collected and paid over to the county, taxes assessed at a rate higher than that allowed by law, is not liable for the excess to the tax payers, nor can he recover back the excess so paid over, from the county.

ERROR to Lewis Circuit Court.

*ELLISON, for Plaintiff in error, insists :*

The first instruction asked by defendant below, should have been given: because there is no evidence, even tending to show a promise by defendant to plaintiff.

The second instruction of defendant should also have been given. The evidence showed the jury might find those facts, and from them the law would not raise a promise to pay.

The third and fourth instructions of defendant, are in substance the same, and should have been given. A demand before suit is certainly necessary. *Elliott vs. Swartwout*, 10 Peters Rep., 137; *Leighs Nisi Prius*, title, money had and received.

*LEONARD & BAY, for Defendant in error, insist:*

The plaintiff is entitled to recover from the county the amount overpaid. The money was paid to the county under a mistake of fact, and without any fault of plaintiff. The mistake indeed, is solely attributable to the county. *Preston vs. Boston*, 9 Pick., 7; *Perry vs. Dover*, 12 Pick., 215; *O'Fallon vs. Boismesnel*, 3 Mo. R., 287; R. S. 1835, Title Revenue, p. 533, sec. 23; p. 534, sec. 33; p. 536, secs. 8, 9, 10; p. 538, sec. 29; p. 540, sec. 2.

*NAPTON, J., delivered the opinion of the Court.*

Tate brought an action of assumpsit against Lewis county, under the following circumstances. The revenue law of 1842--3, authorized an increase of tax from 1-8 to 1-6 per cent. on the assessed value of property, but not to take effect until 1844. The assessor of Lewis county, under the belief that the law was then in force, assessed the revenue for 1843 at one-sixth of one per cent, and returned his tax book to the County Court. This Court having corrected the tax book, as by law they were directed to do, and having levied the county tax at 100 per cent upon the State tax, caused the tax book to be placed in the hands of the plaintiff, Tate, who was collector of the county. The plaintiff proceeded to collect both State and county taxes, and having paid over, into the county treasury all the taxes due the county, after the usual deductions, had a settlement with the accounting officers of the State. In that settlement,



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*County of Lewis vs. Tate.*

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it seems the Auditor of Public Accounts allowed the collector to retain \$515 11, money collected for the State, that being the difference between one-sixth and one-eighth per cent upon the assessed value of the taxable property of Lewis county. And this suit was brought to recover of the county, the difference between one-sixth and one-eighth per cent, collected for the county and paid into the county treasury.

Upon the trial, the Circuit Court instructed the jury, that if the defendant had received money from the plaintiff, which in equity and good conscience belonged to the plaintiff, he, (the plaintiff,) was entitled to a verdict for the amount so received; that if the sheriff had collected money illegally, he was bound to refund such money, and if paid over to the defendant, he is entitled to receive it back; that if the County Court laid the county levy at the rate with the State tax for 1843, which for that year was one eighth of one per cent., and if, through mistake, the sheriff paid one-sixth of one per cent. he is entitled to recover one-fourth of the sum so paid.

The defendant asked several instructions, declaring in substance, the irresponsibility of the defendant, under the facts of the case, which were refused.

A verdict and judgment was given for the plaintiff and exceptions duly saved to the opinion of the court.

We are clearly of opinion, that upon the facts detailed in the bill of exceptions, this action cannot be maintained. The only ground on which such an action could be maintained, is the assumed liability of the collector to the tax payers. No principle is better established by repeated adjudications, of the most respectable tribunals, than the entire exemption from responsibility on the part of the agent, in a case like this.—The taxes assessed by the assessor, and sanctioned by the County Court, were collected from the citizens, without any objection on their part at the time of collection, and with no subsequent notice not to pay over to the county. The money thus collected was paid over into the county treasury. Whatever may be the liability of the county, and of this we are not authorized to give any opinion, it is clear that the collector is not liable. Where money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. *Hearsey vs. Payne*, 7 Johns. R., 182; *Fry vs. Lockwood*, 4 Cow., R., 454; *Ripley vs. Gelston*, 9 Johns. R., 201; *United States vs. Buford*, 3 Peters R., 201; *Elliott vs. Swartwout*, 10 Peters R., 137; 7 Cow., 460; 1 Wend. R., 173; *Butler vs. Harrison*, Cowp., 565; *Peto vs. Blades*, 5 Taunt., 657; *Greenway vs. Hurd*, 4 T.



*Martin vs. Greene.*

R., 553; Sadler vs. Evans, 4 Burr, 1984; Snowden vs. Davis, 1 Taun., 359. If then the plaintiff be not responsible for the money thus collected, it would be strange indeed, to permit him to recover from the county, the money which he collected as her agent, and which he has paid over to his principal.

The other Judges concurring, the judgment is reversed.

**MARTIN vs. GREENE.**

1. An objection to the jurisdiction of a court of equity cannot be made after answer. It must be made by demurrer.
2. When an answer does not positively, clearly and precisely deny an allegation in a bill, it is not necessary that it should be contradicted by two witnesses. So, also, where the answer be not sufficiently distinct upon points as to which defendant is presumed to be well informed.
3. The captain of a steamboat, in making a purchase of the interest of one of the owners, an illiterate man, unable to read or write, being called upon by the owner to state the condition of the affairs of the boat, its indebtedness, &c., makes statements as to such matters calculated to deceive the owner—conceals the amount of profits and money on hand, but refers the owner to the clerk—and thus effects a purchase of such owner's interest, will be held liable for the share of the profits of such boat, up to the time of the sale, going to such owner.

**APPEAL from Platte Circuit Court.**

**WILSON & REES, for Appellant.**

**LEONARD & BAY, for Appellee, insist:**

1. The motion to dismiss the bill was properly overruled. The appellant, Martin, as master of the steamboat, was the confidential agent of the owners. (3 Kent's Com., 161.) The appellee, Greene, being one of the owners of the boat, had a right to file a bill of discovery against Martin for an account of any property of his principal obtained by any improper means; and the court of chancery having jurisdiction for the discovery, will, to avoid multiplicity of writs, proceed to administer the proper relief. 1 Story's Eq., 468-9, 470.

Besides, the conduct of Martin, in making false representations as to the affairs and concerns of the boat, was a gross breach of trust, and a fraud upon his principal. Such acts will always entitle the injured party to relief in equity. 1 Story's Eq., 325-6, 3rd edition.

2. The motion to dismiss the bill for want of jurisdiction, was made too late. The defendant

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should have demurred to the bill; by the answer, he has put himself upon the merits. 4 J. Ch. R., 290.

3. It is admitted that where the answer of a defendant is "positively, clearly and precisely" responsive to the matter stated in the bill, it is to be taken as true, unless it be contradicted by two witnesses, or by one witness and corroborating circumstances. But the answer of the defendant in this case is evasive and uncertain. He does not deny some of the material allegations in the bill; others he denies in a very evasive manner. His answer shows that he endeavored to leave false impressions upon the mind of the complainant as to the true condition of the affairs of the boat. *Roundtree vs. Gordon*, 8 Mo. R., 24-5; *Greenleaf on Ev.*, 297-8; 1 *Phillips on Ev.*, 154-5.

4. The complainant was entitled to his share of the earnings of the boat, whether the amount was known at the time of the sale of his interest in the boat or not. He only sold his share of the boat, and not his share of the earnings. The answer does not deny this, but only denies that the defendant knew what the amount of the earnings was at the time of the sale, and calls upon the complainant for strict proof of the amount. This proof is furnished by the answer of the clerk. An answer professing a want of knowledge of the fact, only puts the complainant to prove it by one witness, or what is equivalent. *Cow. & Hill's notes to Phillips on Ev.*, part 1st, page 287, note 294.

The defendant must state positively what he must have knowledge of, or the ordinary proof by one witness will overcome the answer; *ib.* The defendant, from his situation as master of the boat, must have had knowledge of the condition of the affairs of the boat. At all events, it was his duty to inform himself of such matters.

*NAPTON, J., delivered the opinion of the Court.*

This was a proceeding on the chancery side of the Circuit Court of Platte county. The bill represented that the complainant, on the 15th June, 1843, was the owner of two-fourteenths of the steamboat "Edna," and that one Frederick Marshall (whose interest he had purchased) owned one-fourteenth; that he was entitled, therefore, at that time, to three-fourteenths of the profits made by said boat, which amounted to \$1750 78. That the defendant was master of said boat at that time, and had been several years previously, and as such, was well acquainted with the condition of the boat and her liabilities and profits, and well knew that the nett proceeds then on hand amounted to the sum before mentioned; that the complainant, anxious to learn the true condition of the affairs of said boat, about the time above specified, called on said Martin, when the latter fraudulently concealed the same from him, and represented that said boat was greatly indebted, and without any means of payment, and that there was no cash on hand, and at the same time proposed purchasing complainant's and Marshall's interest. That the complainant, confiding in these representations of his agent, the said defendant, sold to the said Martin his interest and the interest of the said Marshall, at a very reduced price, to-wit: for \$575, and for the interest of

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said Martin in some lots in Platte City. That by virtue of said sale, the defendant retained all the share of the \$1750 75, which was then the clear profit of the boat, which the complainant and said Marshall were at that date entitled to. The bill proceeds to charge that the defendant, for the purpose of defrauding the complainant, had requested the clerk of the boat to "*leg for him,*" and to help him in lying; that defendant also told other and different persons, with the same fraudulent purpose, that said boat had on board no more money than would pay its debts, well knowing the same to be false. The complainant charges that these facts are in the knowledge of defendant, and therefore prays that he may be compelled to answer, and that he be decreed to refund the three-fourteenths of the profits, &c., and for general relief.

The answer of Martin admits the interest of complainant, and the sale, &c., but denies that at the date aforesaid (15th June, 1843) the boat was out of debt, but avers that it was in debt to a considerable amount, having been sued for damages, and threatened with suits—though defendant does not undertake to say how much indebtedness existed.—The defendant denies that \$1750 78 was on hand, but does not know what amount of cash there would have been on hand if all debts had been settled. He admits that he was captain or master of said boat, and was as well and accurately informed of the true condition of the affairs of said boat as men acting in the capacity of captain or master usually are, but that he did not know or believe that there was or would be in cash on hand the said sum of \$1750 78, but that the same would fall greatly below that estimate. He admits that he was called upon by complainant for a disclosure of the true condition of the boat, at the time specified in the bill, but avers that he referred him to the clerk and the books of the boat, and requested the clerk to furnish him with full information, and that the clerk afterwards told him he had so done. He denies all fraud. He avers that the town lots spoken of in the trade between complainant and him, were estimated at \$2000. He denies that he told the clerk to "*leg for him,*" &c., but says he told the clerk that if he would help, that a trade might be effected between him and Greene, but he was more anxious to sell than to buy. He declares that complainant was anxious to sell, and accordingly took a trip down the Missouri with him, and whilst on the voyage, much conversation passed between them in relation to a trade, and the defendant offered to give complainant one hundred dollars if the complainant would make him a proposition to either give or take; and the said complainant refusing, the de-

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fendant offered to bet fifty dollars that he would take complainant's proposition, if he would make one, &c.

McCord, the clerk, testified, that on the landing of the boat at St. Louis, (after the trip on which Greene came as passenger) the defendant came to his office and told him that complainant had proposed to sell him his interest, and that of his son-in-law, (Marshall) in the steamboat Edna, and requested him to examine the books of the boat and ascertain as near as practicable what amount of money was due said boat, what amount she owed, what amount was on hand, and the amount of profits on hand at the time. He did so, in the presence of the defendant. He then paid off the debts of the boat, and the defendant then requested the witness to "leg for him," assist him, and induce the plaintiff to sell his interest, &c., and requested him to say nothing to complainant about the amount of money then on hand. Witness stated that he did not directly or indirectly have any thing to do with the trade between complainant and defendant, and had no conversation with either party, except as stated. That he settled up the books on the 17th June, and the cash on hand, after paying all debts, was \$1750 78. On that day, the boat left for her trip up the Missouri. During this voyage, complainant and defendant both called on him and requested him to draw up in writing the terms of the sale, which they informed him had been agreed on,—which he did. This witness further stated that Greene never called upon him for any information in relation to the affairs of the boat—though he had frequent conversations with him on other subjects—and that Greene can neither read nor write.

A witness for the defendant stated, that some time in the summer of 1843, he heard a conversation between complainant and defendant in St. Louis, in which complainant informed the witness that he had sold his interest in the Edna to defendant; and, when asked the price, remarked that he had sold it for "chips and whetstones,"—i. e., Platte City lots and a small sum of money;—he subsequently spoke with satisfaction of the trade, &c.

John W. Martin, another witness for the defendant, and a brother, testified that during the trip on which Greene was a passenger, he heard the defendant tell Greene to go to the office and ascertain the condition of the boat's affairs, and he saw Greene and the clerk looking over the books frequently during the passage. It was admitted that Greene could neither read nor write. At the hearing of the cause, a motion to dismiss the case, for want of jurisdiction, was made, but it was overruled.

The complainant had a decree for \$450, being three-fourteenths of the



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said sum of \$1750, and interest from the date of the sale to the decree. Defendant appealed.

It is contended, on the part of the appellant, that the Circuit Court should have dismissed this bill, on his motion, at the hearing of the cause, on the ground that his remedy was at law, and not in equity. It is most proper that such an objection should be made by a demurrer to the bill. After the defendant has answered, and the parties have gone to the expense and trouble of procuring their testimony, and the case is submitted upon its merits, it is, to say the least, with a very bad grace, that the defendant for the first time objects to the jurisdiction of the court. In New York, it is well settled that such objections come too late, when made at the hearing. *Ludlows vs. Simonds*, 2 Caine Ca., 40; *Underhill vs. Van Cortland*, 2 Johns. Ch. Rep., 370; *Rathbone vs. Warren*, 10 John. Rep., 595; 4 Johns. Ch. Rep., 290. In other States, the rule established by those cases has been to some extent departed from; but we think the principle a sound one, and one which should be adopted in our practice.

The principal objection made to the decree on the merits is, that the answer is contradicted by only one witness. It is admitted that one witness cannot outweigh an answer, where the answer is clear, explicit and full; but if the answer be evasive, or not sufficiently distinct on points upon which the defendant must be presumed to be well informed, the rule has no application. Had these parties been strangers to each other, and maintained the mere relation or position of vendor and vendee, we should be disposed to doubt the propriety of the decree made by the Circuit Court. But the master of a boat is the confidential agent of the owners. He is either informed of the condition of its pecuniary affairs, or he at least has the means of easily acquiring that information. The complainant, it seems, was an unlettered man, unable either to read or write, and having a desire to sell his interest as part owner, he had a right to expect from the defendant a full disclosure of the affairs of the boat. The defendant admits that an application was made to him for this purpose by the complainant, but alleges that he referred him to the clerk. It does not appear that the complainant ever made any application to the clerk, but the testimony of the clerk and the answer of the defendant are contradictory on this point. It will be observed, however, that the defendant does not deny that he himself had all the information on this subject which the clerk had. It is true, he states that he knew as much about the affairs of the boat as men in his station usually do. What that information may be, we are unable to say, but the clerk states, and on this



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point there is no conflicting testimony, that he had, at the request of the defendant, examined the books and ascertained the amount of the nett profits of the boat up to the date of the calculation, and furnished the defendant with that estimate. The statement of the defendant does not contradict this fact; he merely says that he did not believe, and does not yet believe, that the amount of cash on hand was so large as represented, but does not say what amount he conjectured to be on hand. The circumstances of his position, and the fact that he was about to trade with the complainant, must be sufficient to show that he must have informed himself to some extent of these particulars. His answer on this point is then unsatisfactory and evasive.

So in relation to the charge in the bill that the defendant asked the clerk to "leg for him," (an expression which seems to be regarded as implying some fraudulent act) the defendant denies the use of the language charged, but admits that he asked the clerk to help him in making the trade. Perhaps, under ordinary circumstances, this would be regarded as an indication of no fraudulent or improper conduct, but when we consider the relation between these parties, the superior advantages possessed by the defendant in consequence of his accurate knowledge of the condition of the affairs of the boat, which knowledge he does not pretend that he communicated to the complainant, and the incapacity of the complainant to avail himself of the privilege which he possessed in common with other part owners, of examining himself the books kept by the clerk, it is not surprising that a court of equity should not be disposed to place a very favorable construction either upon the actions or language of the defendant. It is the duty of this Court, where this confidential relation exists between parties, to look narrowly to the conduct of the agent.

This bill is not brought for the purpose of setting aside the contract between the parties, but simply for discovery of property alleged to be fraudulently concealed from the complainant, and seeks relief, it is presumed, upon the principle that the court of chancery having jurisdiction, so far as the discovery is concerned, would proceed to adjudicate the matter upon its merits, without turning the party round to a court of law. Whether this view of the jurisdiction of the court was correct, is not now examinable into. The case was tried on its merits; there was no demurrer to the bill, and it was too late to raise the question of jurisdiction at the hearing.

Judge McBRIDE concurring, the decree is affirmed.

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*Bergen vs. Bolton & Colt.*

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**SCOTT, J., dissenting.**

In this case, I do not think the evidence sufficient to establish the complaint set up in the bill. The complainant had ample means of informing himself of the indebtedness of the boat, and the evidence showed that he availed himself of them. It is not pretended that he was deceived or misled by the clerk, on whom he called for information.

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**BERGEN vs. BOLTON & COLT.**

Two defendants being sued, but only one served with process, and the plea not specifying for which defendant it was filed, judgment by mistake was rendered against both. The court had the power at any time during the term to correct the judgment, and make it only against the one served with process.

**ERROR to Marion Circuit Court.**

**WELLS, for Plaintiff in error, insists :**

1. If Butler did not appear, (he not having been summoned,) the suit should have abated as to him at the October term, 1844.

It was irregular to proceed in the cause (except to bring him in,) without an abatement as to him. See Stat. on Practice.

2. After an issue, trial and verdict against two defendants, it was irregular and unauthorized, to make an entry to stand for five days earlier, of a verdict and judgment against one.

3. If the issue was with two defendants, the verdict and judgment should correspond. If the issue was with one only, then the first verdict and judgment was irregular and void, and the only remedy was to grant a new trial. The error could not be cured, by entering on the record facts that never existed.

4. The power in the court to make entries *nunc pro tunc*, is one to be exercised by the court to correct the errors of the clerk, but not the errors of the court. The court may supply an omission of the clerk, by causing that to be entered, which ought to have been entered before, but not by entering what the court ought to have done but did not do.

In this as in all cases of amending the records, the court must have something to amend by. He cannot rely on his own memory, or the memory of others, much less can he determine what he ought to have done, and order it to be entered that it was done.

5. The verdict was wrong. The evidence showed a several liability of Bergen, if any; and the verdict was for a joint debt. If the verdict was proper, it was error to set it aside; if it was wrong it could only be remedied by a new trial.

6. When the motions for a new trial and in arrest, were made and overruled, the verdict and

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*Bergen vs. Bolton & Colt.*

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judgment were both confessedly erroneous, for they were afterwards set aside; yet both these motions were overruled; this was then error, and that error could not be cured by another, the *nunc pro tunc* entry.

**RICHMOND, for Defendant in error, insists:**

1. There was conflicting evidence in this case and certainly no great preponderance in favor of the appellant. No instructions were asked, the verdict cannot be disturbed being found by the court. *Wilson, et al. vs. Burks*, 8 Mo. R., 446; *Little, et al. vs. Nelson*, 8 Mo. R., 709; *Von Phul vs. City of St. Louis*, 9 Mo. R., 49.

2. The judgment as it appears from the whole record should have been in favor of the defendants. *McFadin vs. Ripley*, 8 Mo. R., 738; *do.*, 707, *Swearingen & Bredel vs. Orme*.

**NAPTON, J., delivered the opinion of the Court.**

This was an action of assumpsit by the defendants in error against Bergen & Butler. The suit was instituted in March, 1844, and process was served on the plaintiff in error Bergen, the defendant Butler not being found. At the October term, 1844, a plea of *non-assumpsit* was filed by Vanswearingen, attorney for defendant; the plea not specifying for which defendant said attorney acted. At the August term, 1846, the cause was submitted to the court, and the court found the issue for the plaintiffs, and judgment was entered against the defendants for the amount found by the verdict. During the same term the defendant Bergen moved for a new trial, assigning the usual reasons. He also moved in arrest of judgment. On the same day the plaintiffs moved the court to set aside the verdict and judgment as against Butler, for the reason that said Butler was included in the judgment by mistake, he not having been served with process. The two motions of the defendant Bergen were overruled, and the motion of the plaintiffs was sustained, and by order of the court, judgment was entered up then, as of the day when the judgment referred to and set aside was entered, and the suit was dismissed as to the defendant Butler.

The only error assigned, is the action of the court on the motions, in setting aside the judgment as to Butler, and refusing to set aside the verdict and judgment as to both defendants. We see no objection to the course pursued by the Circuit Court. To correct the irregularity in entering up a judgment against both defendants, when only one had been served with process, it was not necessary to open the judgment against the defendant, who had been served with process, and had appeared to and defended the action. No injury resulted to him from such a proceed-

*Wallace vs. Boston.*

ing, and it was clearly in the power of the court to make the correction. The proceedings all took place at the same term and we see nothing in them irregular or illegal.

The other Judges concurring, the judgment is affirmed.

**WALLACE vs. BOSTON.**

1. Partial failure of consideration could not under the act of 1845 be given in evidence in an action on a note, under the general issue, without notice.
2. It is only necessary to set out in a bill of exceptions so much of the evidence as conduces to establish a fact, upon which a principle of law is raised.

**ERROR to Carroll Circuit Court.**

**KELLY, for Plaintiff in error, insists :**

That the court erred in admitting evidence under the general issue of *nil debet*, without notice, to show a failure of consideration. See *Steinback vs. Ellis*, 1st Mo., 293; Rev. Code, Article 7, sec. 19 of Practice at Law.

That quiet possession of land from the vendor to the vendee, is sufficient consideration at law, to give a recovery of the purchase money. See *Brown, et al. vs. Reeves, et al.*, 7th Martin's Louisiana Rep., 235; *Ott vs. Garland*, 7th Mo., 28.

That when there is a covenant for title, to make a want of consideration a good defence at law, the vendee must show the inability of the vendor to refund the purchase money. See *Bluffey vs. Brickey*, 5 Mo., 395.

**ABELL, for Defendant in error, insists :**

1. The bill of exceptions does not show, nor pretend to show, all the testimony given in the cause. This Court therefore will not reverse the judgment of the Circuit Court. See *Hughes vs. Ellison*, 5 Mo. Rep., 110.

2. If the bill of exceptions does contain all the testimony in the cause, then it is clear the judgment is correct; because the bill of exceptions does not show, that any testimony was given to prove the assignment of the note, or that the assignment or the note, was read in evidence to the jury.



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*Wallace vs. Boston.*

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McBRIDE, J., delivered the opinion of the Court.

Wallace, as an assignee of Langford, brought his action by petition and summons in debt, against Boston, on a promissory note for \$133, due twelve months after date, and dated the 22d August, 1842. Plea, *nil debit*.—Judgment for the defendant. Motion in arrest and for a new trial, which was overruled, and exceptions taken, and the case brought to this Court by writ of error.

Upon the trial in the Circuit Court, the defendant offered evidence to prove, that the note sued on, was given in consideration of a tract of land purchased by him from Langford; that Langford had executed his title bond for the conveyance of said land, by a good and sufficient deed, when the defendant should pay the purchase money; that the land was patented by the government to one Bayne S. Berry, and there is no evidence on record of any conveyance from Berry to Langford or any other person, of said land; that a certain William S. Smith undertook, by deed, to convey the said land to E. D. Sappington, who conveyed to Langford. To the introduction of the foregoing evidence, the plaintiff excepted, but his exception was overruled by the court.

The plaintiff then introduced evidence to prove, that the defendant was in the quiet and peaceable possession of said land, and prayed the court to give to the jury the following instructions:

1. That should the jury believe the said defendant is in possession of the land, for which the note sued upon was given, and that he purchased said land from said Langford, and that said possession is quiet and undisturbed, they will find for the plaintiff.

2. That should the jury believe, that said defendant holds said Langford's title bond, and that said defendant is in possession of said land from said Langford, they will find for the plaintiff.

The instructions were refused by the court and the plaintiff excepted.

At the instance of the defendant, the court instructed the jury as follows:

1. That if they find from the evidence, that the note sued on was a part of the consideration of a tract of land, and that the title to said land was conveyed by the government of the United States to Bayne S. Berry, then, unless they find from the evidence, that Jesse Langford, the assignor of the note, has a chain of title from Berry to him, they will find for the defendant.

2. The patent read in evidence, proves that the government of the United States conveyed the land to Bayne S. Berry, and there is no



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*Wallace vs. Boston.*

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evidence before the jury, that the title to said land has passed from said Berry.

3. The plaintiff has produced no evidence of title in Jesse Langford, the assignor of the note.

To the giving of which the plaintiff objected and excepted.

The following questions are presented for the decision of this Court:

1. Did the Circuit Court err in admitting evidence under the general issue, without notice, to show a failure of consideration of the note sued upon? 2. Did the court err in refusing to declare the law to be, as asked for by the plaintiff?

A preliminary question is raised by the defendant, which does not arise on the record and which we presume was not presented to the court below, and cannot therefore receive any favor in this Court. It is contended that the judgment of the Circuit Court should not be reversed, because the record contains no evidence given in that court, to prove the assignment of the note sued upon, nor any that the note or assignment thereon, was read to the jury. If in point of fact, the assignment was not proved, and the note was not read to the jury, and the defendant intended to rely for a defence, upon such omission, he should have raised the question in the Circuit Court, when that court, in the exercise of a legal discretion, might have permitted the plaintiff to make the proof necessary to the admission of the note in evidence, or have non-suited the plaintiff for failing to make such proof. The question not having been made and decided by the Circuit Court, cannot be raised in this Court and made the subject of error.

The only plea in this case being the plea of *nil debit*, we are of opinion that the Circuit Court committed error in permitting the defendant to introduce evidence for the purpose of showing a partial failure of the consideration of the note sued upon. If the defence was available at all, the defendant to entitle himself to make it, should have pleaded it specially, thereby giving the plaintiff notice of the real defence in the case.— But whether a partial failure of consideration can be interposed, as a defence in an action at law, under any state of pleadings, has been decided both ways by the courts; which is the better opinion, it is not necessary now to decide, as our law permits the defence when it is set up by a special plea, or a notice given that it will be relied upon under the general issue. R. C., 1845, 832, § 19. In the case under investigation, the pleadings in which were made up prior to the taking effect of the above statute, manifest injustice might be done the plaintiff, by permitting the defendant to set up a partial failure of consideration of

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the note sued upon, growing out of a defect in the title of the land for which it was given. The defendant is in the quiet and undisturbed possession of the land, and should not be permitted to hold such possession, which may never be disturbed, and at the same time withhold the payment of the purchase money. If there be in fact any defect in the plaintiff's title, for the whole or any part of the land, or if the plaintiff be not responsible upon his covenant for title, then the proper remedy for the defendant, is a resort to a court of chancery, which is fully competent to perfect the title, if it can be done, or compensate the defendant for any partial loss he may sustain, or rescind the contract and enjoin the collection of the purchase money. Thus doing full and complete justice between the parties, according to the exigency of the case.

If the foregoing view of the subject be correct, it results that error has been committed to the prejudice of the plaintiff, and that the verdict and judgment should be set aside and a new trial had in the premises.— Upon the return of the case to the Circuit Court for a re-trial, that court should permit the defendant to amend his pleadings in conformity with the statute heretofore referred to, so that he may avail himself of the defence now authorized by law.

Another point is raised by the defendant's counsel, which it may be well here to notice, as it may tend to correct an erroneous impression which we find counsel generally laboring under. It is only necessary for a bill of exceptions to contain a brief summary of that portion of the evidence which conduces to the establishment of a fact, upon which a principle of law is raised, thereby showing that the question of law presented to the court, grows out of the evidence and is not irrelevant to the issue.

Judge NAPTON concurring herein, the judgment of the Circuit Court is reversed and the cause remanded.

Judge SCOTT did not sit in this cause.

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**GATHWRIGHT vs. CALLAWAY COUNTY AND STATE OF MISSOURI.**

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1. A bond payable to "Callaway county and State of Missouri," is payable to Callaway county alone. The words "and State of Missouri" merely designate the Callaway county, and are equivalent to "of" or "in the State of Missouri."

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2. The circumstances under which an instrument is made may be looked to, to aid in its construction.
3. The rules of interpreting contracts ought not to be subtle—are not an art of logic—but are intended for persons of common understanding—are plain reason.
4. Where a bond is set out according to its legal effect, and not in *haec verba*, if no oyer be craved, the court will take it to be as averred.
5. A bond being given to two corporations, an action may be maintained by them jointly.
6. A bond given to do some public service, although not good as a statutory bond, may yet be good at common law.
7. A bond given to build a bridge and keep it in repair a given time, will bind the obligor to rebuild, if the bridge be washed away even by an extraordinary flood in such time.
8. The remedy given by the 13th and 14th sections of the act concerning bridges is merely cumulative, and does not affect the right of action upon the bond. In such action, no notice to the obligors to repair is necessary.
9. The proper measure of damages, where the bridge has been washed away, is the cost of rebuilding, with such premium as is necessary to ensure the bridge against the contingencies embraced in the bond, for the time specified therein.
10. If the obligors delay the rebuilding for an unreasonable time, the county may also recover damages for such delay: these damages depend upon circumstances—such as the public utility of the bridge, &c.—and are not six per cent. on the amount due from the obligors, from the time they should have repaired.

## APPEAL from Callaway Circuit Court.

## TODD &amp; HARDIN, for Appellant, insist:

1. The action is brought in favor of two corporations, which, by statute nor general law, can join in action; this is not obviated by reason of a bond executed to such obligees; the law vests the right in the county, and she should sue; the State has no right under the contract; and when she cannot contract, she cannot sue.
2. The bond, though thus informal, is a statutory bond, and the suit and proceedings, and construction of the contract, must be in conformity to the statute.
3. The demurrer should have been sustained also, for there is no averment of notice and demand of the contractor to repair the bridge, after its loss and destruction.
4. The evidence of the original cost and mode of payment for the bridge was incompetent and irrelevant, and misled the jury as to the true assessment of damages.
5. That the bridge having never been rebuilt, no interest should have been allowed, as for money advanced by the county.
6. For the same reason, no sum to cover risk and warranty of a new erection should have been allowed.
7. The court erred in the criterion of damages, for the statute fixes the damages at the sum the commissioners may contract for upon refusal of the undertaker to make the repairs.

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8. The court also erred, for it was in proof that there was an entire destruction of the bridge by flood, not by fault of undertaker; a repair, under such circumstances, is not within the condition of the bond.

9. If the defendant is bound for damages to the value of the repair, then the assessed value is unreasonable and oppressive, for three witnesses of four, acquainted with values, fix them at \$450 and under.

*GORDON, for Appellees, insists:*

1. The plaintiffs are persons in law, and capable of suing on a bond made payable to them.

2. The defendant covenanted to build the bridge in a particular manner, and to keep the same in good repair for four years; he was therefore bound to rebuild the bridge, though broken and destroyed by an extraordinary flood. 6th Term R., p. 650 and 751; 16 Mass. R., 238; 3 Monroe's R., 376.

3. The bond sued on, if not good under the statute, is good at common law. 2 J. J. Marshall's R., 473; 4 Monroe's R., 225; 2 J. J. Marshall's R., 418; 2 Bibb R., 199; 4 Litt. R., 235; 2 Litt. R. 306; 3 Monroe's Reps., 342.

4. The court committed no error in refusing the instructions asked by the defendant, nor in giving the instructions asked by the plaintiffs.

5. The amount paid for building the bridge was competent evidence in order to enable the jury to ascertain the amount of damages to which the plaintiffs were entitled.

6. The court committed no error in instructing the jury that they might give interest by way of damages on the amount which they might find against the defendant. 2 Greenleaf's Evidence, p. 217; 1 Mass. R., 308.

7. The defendant is estopped to deny the authority of the plaintiffs to sue on this bond. 3 Marsh. R., 303; 2 Litt. R. 211, 310; 1 J. J. Marsh. R., 380; 2 J. J. Marsh. R., 280; 1 Litt. R., 418.

*SCOTT, J., delivered the opinion of the Court.*

This is an action of debt on a bond executed under the statute concerning bridges, conditioned to build and keep in repair for four years a bridge across the river Aux Vaux, in Callaway county. The style of the suit was Callaway county and State of Missouri *vs.* Alexander Hord and Mat. W. Gathwright, and it abated by death as to Hord. The declaration used the plural number, showing that both the county and State sued. The bond was payable to "Callaway county and State of Missouri." A demurrer was filed to the declaration, which was overruled, and afterwards a judgment by default was taken. On the trial of the truth of the breaches and the assessment of damages, it appeared that the bridge had been built according to contract, and accepted. It was completed in June, 1840, and was washed away by high waters in the spring of 1842. The defendants covenanted to keep it in repair for four years. The action was brought for not rebuilding it. The building of the bridge and the insurance of it for four years were let at \$1000, part of which was



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paid by the county and part by subscribers. The court gave, at the instance of the plaintiff, the following instructions:

1. The jury ought to assess such damages in this action as the plaintiffs have sustained by reason of the defendant failing to comply with the condition of the bond sued on at the time when said bridge should have been repaired.

2. The jury may give six per cent. interest, by way of damages, on the amount which they find to be due, from the time the defendant ought to have repaired the bridge; to which the defendant excepted.

The defendant asked the following instructions:

1. That in this case the plaintiff is not entitled to recover any damages by way of interest on the value of the repairs, which the County Court might have authorized to be made after the destruction of the bridge.

2. That the jury cannot assess by way of damages any part of the private subscription made or paid by individuals.

3. That the assessment must be made for the reasonable value of the repairs, to be made in a reasonable time after the destruction of the bridge.

4. That in the assessment, they cannot allow for damages any risk in the preservation of the bridge after such repair was done or ought to have been done.

5. That in this case no damage for risk or warranty of any bridge or part can be allowed, as the bridge was never rebuilt.

6. That the jury will not find any damage upon the first breach in the plaintiff's declaration, as assigned; which the court refused to give, to which an exception was likewise taken. Verdict for the plaintiffs for \$758 35.

It was objected to the declaration, that the action was improperly brought in the names of "Callaway county and State of Missouri;" that it was a joinder of two corporations as plaintiffs, which by law is not permitted. No oyer of the bond was craved, consequently it is not set out in the pleadings. We must take it as it appears on the face of the declaration. If the bond was in fact payable to the county of Callaway and to the State of Missouri, the principle is not obvious on which an objection to a declaration on it in the names of both corporations would lie. If an obligation is made to two distinct corporations, there is no rule of law which prevents them from sustaining a joint action upon it. It cannot be maintained that, if a bond is executed without any undue advantage or any degree of oppression or extortion by one undertaking to serve the public, that a mistake in the name of the obligee will avoid



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the instrument. If not valid as a statutory bond, it will be held good as a common law security.

If the bond on which this suit is founded be worded as it is stated in the declaration, its interpretation is plain. We may look to the circumstances under which an instrument is made, to aid us in its construction.—*Lawrence vs. Dole*, 11 Ver. Governed by this principle, there can be no hesitation in saying that the meaning and sense of the bond is, that it was payable to Callaway county *in* or *of* the State of Missouri. The words “the State of Missouri,” were used merely to designate the Callaway county to which the bond was payable. There might have been other counties named Callaway, at least in other States.\* The rules of interpretation ought not to be subtle; they are designed for people of common understanding; not as an art of logic, but as the plain reason of a father of a family. It is sufficient, if a plaintiff in his declaration sets out an instrument on which he declares according to its legal effect. He is not tied down to a literal recital of it. To whom the instrument on which this suit is brought, was really payable, does not appear otherwise than as is averred in the declaration. There is nothing showing that it is otherwise worded than as is therein averred. As before observed, there being no oyer of the bond prayed for, and it not being set out *in hæc verba*, so that the court can see whether its legal effect has been misconceived, the defendant can have no benefit of any error that may have been committed in this respect.

Although the bridge was carried away by a flood, yet, under his agreement, the builder is bound to repair. It is an established rule, that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Therefore, if one covenant to keep a house in repair, although it be carried away by flood or thrown down by tempest, yet he is bound to repair it. But when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him, as in waste, if a house be destroyed by tempest.—*Bricknock Navigation Company vs. Pritchard*, 6 Term Rep., 750; *Story on Bailments*, 37, 38.

It was maintained for the defendant, that under the 13th and 14th sections of the act concerning bridges, the right of action for not repairing a bridge could only accrue after a notice in writing to the undertaker or his security to make the repairs, and a failure on their part to do so; and the declaration not having averred any such notice, is therefore defec-

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tive. It is obvious that the remedy provided by these sections is merely cumulative, and does not affect the right of action on the bond. As the defendant covenanted that the bridge should be kept in repair, the fact of its being dilapidated or being washed away was one as much in his knowledge as in that of the commissioner of the county, and he was bound to take notice of it. Had the county abandoned the remedy on the bond, and sued for money expended in repairing the bridge, as she might have done under the above mentioned sections, as such action was given by statute, she would then have been compelled to show that she had pursued its terms, in order to maintain it.

As to the damages, the proper measure of them was the cost of rebuilding the bridge, together with the sum or premium that might be necessary to procure an insurance of it against the perils which the builder's obligation covers, for the remainder of the term for which he covenanted to keep it in repair.

The evidence in relation to the sum advanced by subscribers towards building the bridge, was irrelevant. The question was not who paid for the bridge, but what it was worth. Nor was the county seeking to recover the money she had expended in building the bridge, that it should be necessary to ascertain the amount paid by her. The sole question was as to the amount of damages the county had sustained in consequence of the failure of the defendant to repair the bridge, and evidence showing the cost of the first bridge was admissible.

If the defendant delayed for an unreasonable length of time to repair the bridge, the county was entitled to the damages she could show she had sustained by such delay. These would depend on circumstances.—The utility of the road on which the bridge was built—the necessity of a bridge at the place of its former location—the inconvenience sustained by the inhabitants for the want of it, and various other considerations, would affect their amount. The court therefore erred in giving the second instruction asked by the plaintiffs; and, the other Judges concurring, the judgment will be reversed and the cause remanded.

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*Yantis, et al. vs. Yourie.*

**YANTIS, ET AL. VS. YOURIE.**

In an action by A and B, on a note payable to "the Trustees of the town of Dover," it is competent for plaintiffs to prove by parol that they were the "Trustees of the town of Dover," or that the note was given to them by that name. Any fact tending to prove this is competent.

**ERROR to Lafayette Circuit Court.**

**HICKMAN & WELLS, for Plaintiff in error, insist :**

1. A party may maintain an action on a note given to him by a wrong or artificial name. 1 Monroe, 175; 2 Starkie, N. P. C., 29.
2. When the proper averments are made in a declaration, parol evidence is competent to prove, who was intended by the name in the note.
3. The deed and notes were legal evidence, tending to prove the allegations in the declaration.—The deed to prove that plaintiffs were trustees—the notes to prove that such notes were given.
4. If the notes are not legal evidence, it must be because the plaintiffs cannot recover in such cases. The proofs correspond with the declaration strictly. If so, there ought to have been a demurrer to the declaration. Defects in a declaration cannot be reached by excluding appropriate and legal evidence.

**HAYDEN, for Defendant in error, insists :**

1. That it devolves upon the plaintiffs, to maintain their action against the defendants upon the notes sued on, to *prove* that they were and are "The trustees of the addition to the town of Dover," and that it does not devolve upon the defendant to show that they are not "The trustees of said addition." 8 Wend. R., 480; 15 do., 315; 1 Condensed Rep. U. S., 371; 2 Johns. R., 109; 2 Cowen, 664; 6 Wheaton, 593; 2 Term R., 169; 5 Com. Law Rep., 216; 3 Johns. Rep., 477.
2. That the evidence offered by the plaintiffs to prove that they were "The trustees of the addition of the town of Dover," was not competent or admissible to prove the fact; and that the Circuit Court did not err upon the trial of the cause, in rejecting the same; and consequently committed no error in refusing to set the non-suit aside, &c., upon the motion of the plaintiffs therefor. 1 Greenleaf on Evidence, p. 316, sec. 266; Digest 1835, p. 283, sec. 10.
3. That the evidence offered by plaintiff was properly rejected, because it conduced to show that the plaintiffs had sold defendant lots as the consideration of the notes sued on, situate in a town laid out by them, whereof no plat had been filed in the Recorder's Office prior to the sale. 7 Mo. R., 585, Downing vs. Ringer.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of assumpsit on several promissory notes, executed by the defendant in error to the plaintiffs, by the name and description of "the trustees for the addition to the town of Dover." The declara-

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*Yantis, et al. vs. Yourie.*

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tion was in the proper form, avering that the notes were executed to the plaintiffs by the name and description of the trustees for the addition to the town of Dover. On the trial the plaintiffs offered to prove by witness, that they were the trustees for the addition to the town of Dover; that they had acted as such, that as such, notes had been executed to them by that description, and that they were known as such trustees.— This evidence was excluded by the court. The plaintiffs then offered to read a deed showing that they had been made trustees for the addition to the town of Dover, by the owners of the land on which the addition was laid out. This was likewise excluded. The plaintiffs, after offering to read the notes, took a non-suit and have brought the case to this Court.

We do not see on what principle, the evidence offered by the plaintiffs was rejected. If a note could be taken by them by the name and description of the trustees for the addition to the town of Dover, it is clear that evidence was admissible to show that they were the persons designated by that description. Any testimony tending to prove the fact was competent. This is similar to a suit by the members composing a firm. A mercantile partnership might assume the name and style assumed by the plaintiffs; would not the ordinary evidence of a partnership in that event be sufficient to show who were the persons composing the firm? Although a partnership is created by deed, yet it may be shown by parol evidence, who are the persons composing it.

The statute concerning the laying off of towns, had nothing to do with this matter. So far as the point involved in this case is concerned, it is indifferent whether there was any addition to the town of Dover, or not, or in what manner it was laid off, or by whom. The only question was, whether the plaintiffs were the persons designated by the description of "the trustees for the addition to the town of Dover." The evidence clearly conduced to establish this fact, and was beyond all question admissible. It was a matter of indifference, whether the plaintiffs arbitrarily and capriciously assumed the description, or whether they really were the trustees for the addition to the town.

The other Judges concurring, the judgment will be reversed and the cause remanded.



*Minor vs. Edwards and Price.*

## MINOR vs. EDWARDS &amp; PRICE.

1. A and B make to C a bond for the payment of \$1300, *provided*, however, that said sum shall not be payable until C shall make, execute and tender to A, a good and sufficient deed conveying a clear title in fee simple, with warranty, to certain lots of land—such bond is assignable, and the assignee may maintain an action in his own name.
2. The condition of such bond may be waived or discharged by parol.
3. A count upon such bond, averring the making a deed as required by the proviso, must make profert of such deed.
4. A count, however, averring simply the making a deed, which was accepted in discharge of the condition, need not shew such deed.

## ERROR to Cole Circuit Court.

## HAYDEN, for Plaintiffs in error, insists :

1. That by the statute of this State, the bond sued on is assignable, and that the plaintiff, as the assignee thereof, has the same right to sue thereon for the debt therein mentioned, as the assignor had, in his own name. Digest, p. 190, sec. 2.

2. That the proviso in the bond that the money therein specified was payable upon the making and tendering a good and sufficient deed to said Edwards, conveying to him a clear title in fee simple to said lots of ground, is a stipulation or proviso *made by said Edwards and Price* for the protection and benefit of said Edwards, and is not a covenant nor obligation made by the payees of the bond; and therefore the said Edwards, to whom the deed was to be made by the payees of the bond, could waive or excuse the payees from making the deed, either by parol or by deed, prior to the payment; and the fact of such excuse or waiver may be proved, or implied from the proof of any fact or circumstance which rationally conduces to establish its existence. And for the same reasons, the defendants might have modified the stipulations as contained in the proviso, by accepting a *partial* performance thereof by payees of the bond. And in like manner, the payees could have been excused, &c. from the performance of a similar stipulation as the one contemplated in the proviso, had the stipulation been made by their *express covenant, under seal*. 3 Johns. Rep., 528-9, 530-1-2; Fleming vs. Gilbert, 1 John. Cases; Keating vs. Price, 22; 2 Wend., 590, 591; Langworthy vs. Smith, 20 Johns., 460.

3. The declaration, and every count therein contained, is good and valid, and therefore the court erred in deciding the 2nd and 3rd counts thereof to be bad, upon the plaintiff's demurrer to the defendants' 2nd, 5th, 7th, 8th, 9th and 13th pleas; as also did the court err in overruling the demurrer to said 13th plea.

4. The court erred in not sustaining said demurrer of plaintiff to said 13th plea of defendants.

5. That the instruction given to the jury, at the instance of defendants, is erroneous, and ought not to have been given.

## STRINGFELLOW, for Defendants in error.

1. The *second* and *third* counts set up a parol discharge of the condition of the deed, as an ex-



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cuse for a failure to comply with the condition. These counts do not set up any new parol contract as a cause of action, but are founded upon the bond, and the right to recover is based upon a parol release of the condition. In the case of *Delacroix vs. Bulkley*, 13 Wendell, 71, the English and American cases are reviewed, and the rule laid down as well settled: "A sealed executory contract cannot be released or rescinded by a parol agreement." In *Allen vs. Jaquish*, 21 Wend., 630, this case is reviewed and fully recognized. In the case of *Paul vs. Edwards*, 1 Mo. Rep. 25, the Supreme Court of this State acknowledges the same rule; and in *Raymond vs. Fisher & Hanson*, 6 Mo. Rep., 30, the same principle is fully recognized and the authorities reviewed.

Where a parol contract is substituted for a contract under seal, the remedy is upon the new contract, and not upon that under seal. The party cannot, by proof of the new parol contract, recover on the sealed contract. 6 Mo. R., 30; *Chitty Pl.*, 1st vol., 523; 9 Johns. Rep., 115; 2 Wend., 587; 10 Wend., 180; 11 Wend., 27; 16 Wend., 586; *ib.* 630; 7 Mo. R., 530; *Colgan vs. Sharp*, 4 Mo. R., 41; *Clendennen vs. Paulsel*, 3 Mo. R., 320; *Crump vs. Mead*, 3 Mo. Rep., 233; *Helm vs. Wilson*, 4 Mo. R., 45.

2. Under the issues submitted to the jury, it devolved upon the plaintiff to prove a compliance with the condition. A mere deed from the vendors was not sufficient evidence. It was necessary to show title in the vendor to show that the deed conveyed title to Edwards. The vendee is an adverse claimant as to the vendor, and can dispute his title. The evidence to show an acceptance of the deed tendered, was immaterial, or at least insufficient under the issues tried. The first and fourth counts averred a performance of the condition, but the evidence went only to show a parol discharge, or a substituted parol agreement, and did not entitle the plaintiff to recover. *Raymond vs. Fisher & Hanson*, 6 Mo. R., 30, and cases there cited; *Rector vs. Purdy*, 1 Mo. R. 286; *Frost vs. Pryor*, 7 Mo. R., 315; *Parrot vs. Browning*, 8 Mo. R., 693; 3 Serg. & Rawl.; 9 Mo. R., *Macklot vs. Dubreuil*.

3. The evidence of the witness was insufficient to prove a tender of the deed, and acceptance. He did not show that the deed was delivered at any time before the commencement of the suit, and there being no date, there is no presumption as to its delivery. The only evidence of a delivery was that of the witness; and upon this in no event could the plaintiff recover. The 14th plea put in issue the title of the vendors, and upon this issue the proof of title was thrown on plaintiff.

4. The whole declaration is defective. No count of the declaration making profert of the deed alleged to have been made to the defendant Edwards, but alleging simply the making a deed, and leaving the question of its construction to the jury. 8 Mo. R., 695; 1 Bibb, 283; 3 Coke, 370.

5. The plaintiff was not entitled to sue in his own name, the bond not being assignable. Our statute, making bonds and notes assignable, evidently contemplates that the instruments, although differing in one respect, must in others be alike. It could not have contemplated that an instrument should be assignable merely because it might be under seal, which, if not under seal, would not be assignable. An agreement to pay money, not under seal, upon a contingency that may never happen, is not assignable. The bond here sued on is payable on contingency that may never happen; and hence not assignable. *Thomas vs. Cox*, 6 Mo. R., 508; 11 Mass., 143; 15 Mass., 387; *Chitty on Bills*, 154, 155.

**McBRIDE, J., delivered the opinion of the Court.**

Minor brought an action of debt in the Cole Circuit Court against Edwards and Price upon the following instrument of writing, to-wit:

\$1390. Twelve months after date, we, or either of us, promise to pay Henry P. Paulsel, Jacob Paulsel and Joseph Boggs, the sum of thirteen hundred and ninety dollars, being the purchase money for the following

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lots of ground in the City of Jefferson, county of Cole and State of Missouri, to-wit: out lots number fifty-four, (54) containing twenty acres; number seventy-one, (71) containing eighteen acres and 29-100, and number seventy-two, (72) containing twenty-six acres and 95-100; provided, however, that this bond shall not be payable until said Henry P. Paulsel, Jacob Paulsel and Joseph Boggs shall make, execute and tender to John C. Edwards a good and sufficient deed, conveying unto him, said Edwards, a clear title in fee simple, with warranty, to said lots of ground. Witness our hands and seals, this 7th day of September, 1844.

JOHN C. EDWARDS, [Seal]

THOS. L. PRICE. [Seal]

The declaration contained four counts. The first sets out the above instrument of writing according to its legal effect, and makes profert thereof. It avers an assignment of the bond by the payees to one William B. Smith, and by Smith to the plaintiff; and that on the 3rd October, 1845, the said Paulsels and Boggs did make, execute and tender to Edwards a good and sufficient deed, conveying to him a clear title in fee simple to said lots of ground, with warranty, &c.

The second count is like the first, with an additional averment that the deed tendered to Edwards was by him accepted as a compliance on the part of said payees with the proviso in the bond sued upon.

The third count is like the first and second, except that it concludes by averring that the payees did make, execute, tender and deliver to Edwards a good and sufficient deed, &c., which deed he accepted as a compliance on their part with the proviso in the bond sued upon.

The fourth count is similar to the first.

To the declaration, the defendant pleaded, 1, *Non est factum*; 2, *Nil debet*; 3, That the payees did not assign the bond to Smith; 4, That Smith did not assign the same to the plaintiff; 5, That the payees did not make, execute and tender to defendant, Edwards, on the 3rd October, 1845, a good and sufficient deed, conveying a clear title in fee simple, with warranty, to the lots of land, as alleged in the declaration; 6, Same plea to the first and fourth counts of the declaration; 7, That the payees had not, on the 3rd October, 1845, a clear title in fee simple in and to the lots sold by them to the defendant, Edwards; 8, That said payees had not, on the 3rd October, 1845, or at any time since the making of said supposed deed to Edwards, a clear title in fee simple to the lots for which the bond was given; 9, Same plea as the eighth, but intended to answer the first and fourth counts of the declaration; 10, The deed of the payees was not accepted by Edwards as a compliance on their

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part with the proviso in the bond, as alleged in the second count; 11, Similar plea to the third count; 12, That the defendants did not, on the 3rd October, 1845, accept from the payees a deed conveying the lots mentioned, as a compliance on their part with the proviso of the bond, as is alleged in the second and third counts; 13, That said payees had not, on the 3rd October, 1845, a clear title in fee simple to said lots, as is alleged in the second and third counts; 14, That said payees had not a clear title in fee simple to said lots at the time of the said supposed making of the deed by them to defendant, Edwards, as is alleged by him in the first and fourth counts of their declaration.

The plaintiff took issue upon pleas Nos. 1, 3, 4, 6, 10, 11, 12 and 14, and demurred to pleas Nos. 2, 5, 7, 8, 9 and 13; and the Circuit Court sustained his demurrer to the pleas Nos. 2, 5, 7, 8 and 9, but overruled the demurrer to the thirteenth plea, holding that the second and third counts of the declaration were not sufficient in law, &c.

On this state of the pleadings, a trial was had, which resulted in a verdict for the defendants; whereupon the plaintiff moved for a new trial, assigning the usual reasons, which being refused by the court, he excepted, and has brought the case here by writ of error, and seeks a reversal of the judgment of the Circuit Court.

The principal question of law presented by the record for the decision of this Court, arises on the judgment which the Circuit Court rendered on the plaintiff's demurrer to the defendants' thirteenth plea. Even should the plea be bad, yet if the second and third counts in the declaration are also defective, the rule is, that the demurrer will reach back and operate as a demurrer to those counts in the declaration.

Are the second and third counts in the declaration sufficient in law to authorize the plaintiff to recover? The defendants insist that the counts set up a parol discharge of the condition of the deed as an excuse for a failure to comply with such condition; and refer to authority to show that an executory contract, under seal, cannot be released or rescinded by a parol agreement. This principle may be conceded, and yet the defendants may not reap any advantage, as it has no application to the case now before us. The payees of the bond sued on have entered into no covenant which they now seek to discharge by a parol release. They have not affixed their seals to the bond whereby they covenanted to make the payors a good and sufficient deed, conveying to one of them a clear title in fee simple, with warranty, of the lots of land therein described, before the said payors shall be bound to pay the purchase money. But the obligors, for their own security, and out of abundant caution, have inserted

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in their own bond a proviso that the purchase money shall not be paid until the obligees make, execute and tender to one of them such a deed as is above described; and the obligees having accepted the bond, with the above condition, are bound by it. Being made exclusively for the benefit and advantage of the obligors, it is competent for them, by parol or otherwise, to waive its performance, either in whole or in part. The Circuit Court should, then, have sustained the demurrer to the thirteenth plea of the defendants. *Lawrence vs. Dole*, 11 Vermont, 539; *Morril vs. Chadwick*, 9 N. H., 84; *Monroe vs. Perkins*, 9 Pick., 298; *Dearborn vs. Cross*, 7 Cow., 48.

It is contended that the bond sued upon is not assignable, and consequently the plaintiff is not entitled to recover. Our statute, R. C. 1845, 189, sec. 2, enacts, that all bonds and promissory notes, for money or property, shall be assignable, by an endorsement on such bond or promissory note, and the assignee may maintain an action thereon, in his own name against the obligor, in like manner as the obligee might have done. The bond in suit is one for the payment of money, and is assigned by endorsement thereon; we cannot therefore see the reason why the plaintiff may not bring his suit. The proviso in the bond that it shall not be payable until the payees do a certain act, does not alter the character of the bond so far as to prevent its assignment; it only imposes on the payee or assignee the burden of averring and proving the performance of the condition precedent. The declaration contains the averment, which, if sustained by the evidence, will entitle the plaintiff to a recovery.

The doctrine in regard to bills of exchange has no application to bonds and notes not negotiable, which are made assignable by our statute.

Another question affecting the pleadings in this case has been presented by the defendants' counsel. Neither of the counts in the declaration make profert of the deed, which it is averred was made by the obligees of the bond. The first and fourth counts in the declaration are substantially alike, and each aver that the said Paulsels and Boggs, in discharge of the proviso in the bond, did, on the 3rd October, 1845, make, execute and tender to Edwards, a good and sufficient deed for the lots of ground. Who is to decide whether the deed was a good and sufficient one in law? Whether it was, and discharged the obligees, was a question of law for the determination of the court; and to have enabled the court to decide, the deed should have been submitted to the inspection of the court.—*Coke Litt.*, 355-6; *Sook vs. Knowles*, 1 Bibb, 283; *Barnett vs. Brown*, 8 Mo. R., 693.

The same objection does not however apply to the second and third



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counts in the declaration; for, although the likewise fail to make profert of the deed therein averred to have been made, yet they aver that the deed made by them to Edwards was by him accepted as a compliance on their part with the proviso in the bond. This, we have heretofore said, it was competent for Edwards to do.

We do not deem it important to notice the instruction given to the jury, for, if the case is tried by the principle which we think should govern it, there will most probably be no occasion for the asking or giving any such instruction.

Wherefore, for the reasons above set forth, the judgment of the Circuit Court ought to be reversed, and the other Judges concurring, the same is reversed, and the cause remanded for further proceedings in the Circuit Court, in conformity to this opinion.

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WATTS vs. DOUGLASS.

The verdict of a jury will not be set aside, there being some though slight evidence to sustain such verdict.

APPEAL from Howard Circuit Court.

*DAVIS, for Appellant, insists:*

That the proof was illegal and improper. He sued the defendant for converting the horse to his own use, in going to a place not known to the plaintiff, at the time the horse was let to the defendant; and in attempting to return on the same day, one day sooner than the plaintiff supposed, in letting his horse, he would be able to return, by which his life is lost.

This evidence was no answer to the action, nor the proof offered by the plaintiff. Its natural tendency was to produce an effect upon the jury favorable to Douglass. It may have had an improper influence, to say the least, and being irrelevant, no one can undertake to say how much influence it may have had with the jury. The verdict should be set aside. There was no conflict of evidence, as to the terms of letting, proved by Milton Watts; and there is not a shadow of evidence to show that he had an agency from his father, to change the nature of his contract at the time the horse was delivered, as mentioned by C. R. Scott. Whether the horse was loaned or hired, is not material. If the terms were broken, and the horse lost, it was a conversion of the horse. See Story on Bailments, page 407; 5 Mass. Rep., 104; 12 Pick. Rep., 136; 3 Pick., 492.

The instructions asked by the plaintiff Watts, and given by the court, without objection, are a



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tacit admission that the evidence objected to, was irrelevant and should not have gone to the jury. The verdict ought to be set aside.

*CLARK, for Appellee, insists:*

1. That the fact whether the horse was hired or loaned, as well as the place he was to be carried, was properly submitted to the jury by the instructions given by the court, and there being evidence, from which a jury might find either way, the verdict ought not to have been disturbed. This is a principle well settled by this Court in various decisions.

2. That if Douglass borrowed the horse, he was bound for strict diligence, and the degree of diligence used, was a matter for the jury; so if he hired the horse, being then bound only for ordinary diligence, in either case, the jury, by their verdict decided in his favor. As to the nature of Bailments, and the degrees of responsibility of Bailees, see Story on Bailments, secs. 234-6 and 7, and 398.

*McBRIDE, J., delivered the opinion of the Court.*

Reuben Watts sued James A. Douglass before a justice of the peace, on an account for one bay horse worth \$45, loaned or hired by the former to the latter, the horse having died whilst in Douglass' possession.—Douglass obtained judgment before the justice, when Watts appealed to the Circuit Court, where judgment being against him, he has brought the case here by appeal.

The bill of exceptions contains the evidence given upon the trial in the Circuit Court, and exhibits the following state of facts: Douglass applied to Watts for the hire of a horse, to drive in a buggy to Glasgow, about 12 miles distant. Watts consented to let him have one, provided he would not return on the same day; the horse was sent by Watts' son to Douglass about 8 o'clock in the morning, when the fact was made known to the son, that Douglass would drive the horse to Old Chariton, about two miles from Glasgow, and return on the same evening, when the son remarked, "feed and water the horse, when you get to Old Chariton." Douglass left Fayette about half after eight o'clock in the morning, and reached Glasgow about twelve o'clock, when after a short stay he went to Chariton, where he had the horse put in the stable and fed, and remained until about four o'clock in the afternoon, and then left for Fayette, travelling at the rate of from three to four miles the hour; proceeding about eight miles, the horse was taken sick, perspired very freely, was bled and drenched, and died that night.

At the close of the evidence, the court, at the instance of the plaintiff, instructed the jury as follows:

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1. If the jury believe; that Watts loaned or hired the horse to Douglass, to go to Glasgow, and he went to another place, they will find for the plaintiff.

2. If the jury believe, that Watts loaned or hired the horse to Douglass, on the condition that he should not return until the next day, and they find that Douglass attempted to return to Fayette that same day, and the horse died, they will find for the plaintiff, notwithstanding any care and diligence, which Douglass might have used.

And the court gave, at the instance of the defendant, to the jury, the following instruction: That if the jury believe, that Douglass hired or borrowed the horse from Watts, to drive to Chariton, and that he did not carry him in a different route than the one understood between the parties, or in any other particular, violate the contract, and that the horse came to his death, without any negligence or abuse from Douglass, they will find for Douglass.

No exception was taken to the instructions given, and hence they may be regarded as the law of this case. Upon the trial the defendant introduced evidence to prove, that the horse was moderately travelled and well taken care of by him, to which the plaintiff objected, but the court permitted the evidence to be given to the jury, and the plaintiff excepted, and now assigns the same for error. If it be assumed as incontrovertible, that the hiring of the horse, was for the purpose of going to Glasgow, and not to Chariton, and that the trip was made in one day, when the agreement was, that it was to be made in two days, then the testimony was irrelevant, and should not have been permitted to go to the jury; and if this Court could see, that its introduction tended to mislead the jury, to the prejudice of the plaintiff, it would afford ground for reversing the judgment of the Circuit Court. But the instructions asked for by defendant, and given by the court, makes the case to turn mainly on the fact of the hiring being for the purpose of going to Chariton, and if so, then the evidence was entirely legitimate. The jury must have concluded, that the terms of the hiring from the elder Watts, were changed by the assent of his son, when he brought the horse to the defendant; not that there was any evidence of an agency, other than what might be inferred from the relation existing between the father and the son. That the son did assent, that the defendant might drive the horse to Chariton and back on the same day, was a fact in evidence before the jury, and if that assent was authorized by the father, on the relation existing between them, then the evidence introduced, and excepted to, became material in the case, for the purpose of ascertaining the defendant's

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liability. The jury having found their verdict upon all the facts of the case, and that finding not being without evidence, we see no grounds for disturbing it.

The judgment is affirmed.

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COUNTY COURT OF CALLAWAY COUNTY vs. INHABITANTS OF ROUND  
PRAIRIE TOWNSHIP.

A *mandamus* will not lie from the Circuit Court to compel the County Court to set aside an order vacating a road. The County Court has exclusive jurisdiction in such matters, and its action is final.

APPEAL from Callaway Circuit Court.

ANSELL & LEONARD, *for Appellant, insist:*

1. The report of commissioners, upon a remonstrance against vacating a public highway, does not conclude the matter, and impose upon the court the mere ministerial duty of receiving and filing the report. The power of establishing and vacating roads, is conferred upon the County Courts, by the 2nd section of the act concerning public highways, in the broadest language and without any limitation; and the law has not abridged this power, by substituting in this instance, the judgment of the commissioners, in lieu of the judgment of the court. The 27th section of the act expressly declares, that the judgment of the court, upon the report of these commissioners, shall be conclusive; while the doctrine of the Circuit Court is, that the report is conclusive; and the court is to exercise no judgment whatever in the matter.

2. If the County Court erred in its judgment in the premises, that error cannot be remedied by *mandamus*. This writ is appropriate to compel a court to decide; but not to correct its error when it has decided erroneously.

SHEELEY & JONES, *for Appellees, insist:*

That the answer is not responsive to the petition, but is a labored argument to show, that the Circuit Court had no jurisdiction.

The statute regulating the opening and repairing of county roads, is peremptory on the County Court, and deprives the party of the right of appeal. Rev. Statutes, 961. In this case as there was no appeal or writ of error, a *mandamus* was the proper and appropriate remedy. See 3 Blackstone's Com., 110, 111, and 265, and note; 8th sec. of 5th art. Constitution; 9 Mo. Rep., 118; Boone county vs. Todd, 3 Mo. R., (Republication) 196; 1 Cowen Rep., 31; 2 Cowen, 492; 12 Peters, 524; 5 Mass. Rep., 437; 10 Pick., 59; 3 Conn. R., New Series, 246; 3 New Jersey, 291.

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*County Court of Callaway county vs. Inhabitants of Round Prairie Township.*

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McBRIDE, J., *delivered the opinion of the Court.*

At the June term, 1844, a petition signed by several of the inhabitants of Round Prairie Township in Callaway county, was presented to the County Court of said county, praying the establishment of a road therein designated. The court appointed commissioners to view and mark out a road in conformity to the prayer of the petitioners, who reported a practicable route; whereupon, at the November term, 1844, of the court, the report was approved, the road established, and an overseer appointed to open the same. The road was not opened by the overseer. At the February term, 1846, a petition was presented to the court, by a number of the citizens, praying the court to vacate the road, because if the said road should be opened, the same would be useless and inconvenient, and the repairing of the same, an unreasonable burthen to the inhabitants thereabout. At the May term of the court following, a remonstrance, signed by a number of the citizens, was presented, protesting against the annulling of said road. The court then appointed commissioners to view and report whether the road would be of public utility, &c., who at the next August term, reported the same to be of great utility. Thereupon the court set aside the report and ordered that the said road be vacated, &c.

At the October term, 1846, of the Circuit Court of Callaway county, a number of the citizens of Round Prairie Township, who had petitioned for the road, presented a petition to the Circuit Court, praying a *mandamus* from that court, compelling the County Court to set aside their order vacating the road, and to appoint an overseer to open said road, &c. The petition sets forth all of the actings and doings of the County Court in the premises. A conditional *mandamus* was awarded against the justices of the County Court, two of whom appeared and answered, alleging that in their making of the order, vacating and annulling the road, they acted in conformity to law, and protesting against the jurisdiction thus attempted to be exercised by the Circuit Court over the County Court. To the answer, a demurrer was filed, and the same sustained by the Circuit Court, and then awarded a peremptory *mandamus* against the County Court, to which the justices objected and excepted, and appealed to this Court.

It appears from the record that the public interest and convenience is alone involved in this proceeding, and that therefore the whole subject is placed under the exclusive jurisdiction of the County Court. The law regulating the proceedings is found in the R. C. 1845, p. 964, sec. 23,

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which provides "that any twelve householders of the township or townships, may make application by petition to the County Court, for the vacation of any county road, as useless, and the repairing thereof an unreasonable burthen to such township or townships." The next three sections prescribe what action shall be had by the County Court on the petition. Section 27 declares that "the judgment of the court upon the report of the commissioners, in such cases, shall be conclusive in the premises." See *Overbeck & Shaw vs. Galloway*, 10 Mo. R., 364.

The Circuit Court committed error, in awarding a *mandamus* against the County Court, and its judgment is therefore reversed.

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STATE, TO THE USE OF ST. CHARLES COUNTY, VS. ADM'R OF FULKERSON, AND OTHERS.

1. Under the act of 1835, a sheriff is *ex officio* collector until the 1st January next succeeding the expiration of his term of office as sheriff; and if such sheriff, on the expiration of his term as sheriff, fail or refuse to qualify as collector, the vacancy in the office of collector can be filled by the Governor.
2. Although the commission from the Governor may not state the term for which the officer was appointed, it is not void, but such fact may be shown by parol evidence.
3. When a fact may be proven in different ways, the party has a right to select the mode of proof—and if the evidence offered be competent, it is error in the court to exclude such proof—and although the party may be able to establish such fact by other evidence, he will not be compelled to resort to such other evidence.

### ERROR to St. Charles Circuit Court.

CAMPBELL, for Plaintiff in error, insists :

1. The Governor had power to appoint a collector in place of David McCausland, the outgoing sheriff, who refused to give bond and act as collector for that year.
2. The actual appointment, as offered in evidence, is in usual form of such appointments, and is not rendered void by failing to state in the body of the commission for what year the appointment is made.
3. The office of collector of that county was vacant for the year 1840; the commission was granted in 1840; the bond was given by said Fulkerson and his securities in 1840, and the oath of office taken in the same year, and the commission must be presumed to refer to the then present year.



*State, to the use of St. Charles County, vs. Adm'r of Fulkerson, and others.*

4. After the commission was received, and the bond given, and the oath of office taken under the same, the officer who acted under the commission, and his securities, cannot avail themselves of any such objection to the terms of the commission.

5. The law does not prescribe any form for such commission, and it is the duty of the Governor to couch the same in such language as will be understood. In this case, the power conferred by the commission could not refer to the year 1841, or any subsequent year, because the Governor had no power to issue such a commission for those years; it could not, with any degree of reason, be presumed to refer to the year 1839, or any former year, for it is to be presumed that the revenue of those years had been settled long before that time, and the powers conferred by the commission could not refer to any other year than 1840, without a far fetched absurdity.

6. Even if said commission be defective, in not stating for what year said appointment of collector was made, the court erred in not setting aside the non-suit, for the reason that the bond sued on admits that he was appointed collector *for the year 1840*, and defendants are *estopped* from denying that fact; *vide* Greenleaf's Evidence, vol. 1, sec. 22; also sec. 207, 210 and 211, same vol.; even if the commission had been wholly void, which plaintiff denies that it was.

**BATES, for Defendants in error, insists:**

That the only point for the consideration of the court is, whether or not the Circuit Court erred in rejecting the Governor's appointment of Fulkerson as collector of the revenue was within and for the county of St. Charles.

For the defendants, it is submitted that the paper rightly ruled out. This proceeding took place under the Revised Code of 1835, at p. 536, (art. 3, tit. Revenue) sections 1, 2, 3. The sheriff is made *ex officio* collector of the revenue within his county for two years, commencing on the first day of January next ensuing his election. That he shall give bond "before entering upon the duties of his office," &c.; and if any sheriff neglect or refuse to give bond as collector, "his office of sheriff" shall immediately be vacant; and the County Court shall immediately notify the Governor thereof, and the Governor "shall forthwith appoint some suitable person to fill such vacancy," i. e. the vacancy in the office of sheriff.

By the bill of exceptions, it appears that the reason assigned by the Circuit Court for rejecting the paper is, "that said commission does not state for *what term* said collector was appointed," and the error complained of is, that the reason is not a good one.

For the defendant, it is submitted, 1st. That the reason assigned is good; and, 2nd. If not, still the commission (as it is called) was rightly rejected, and that for several good reasons; and that the judgment ought not to be reversed, because the Circuit Judge may have given a wrong reason for a right decision.

**McBRIDE, J., delivered the opinion of the Court.**

The State of Missouri, for the use of St. Charles county, brought an action of debt in the Circuit Court against William N. Fulkerson, as principal, and William Eckert, Lefrenier J. Chauvin and Peter Fulkerson, as his securities, on his official bond as collector of the revenue for said county for the year 1840, he having failed to pay the same over to the treasurer of said county.

Since the trial in the Circuit Court, Fulkerson, the principal, and

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Eckert and Chauvin, two of his securities, have died, and the suit has been revived against their administrators.

Several pleas were filed to the declaration, (which it is not necessary to notice, as no question arises thereon) when the parties went to trial before a jury; thereupon, the plaintiff suffered a non-suit, with leave to move to set the same aside, which he subsequently did, but the court overruled his motion, and he excepted, and has brought the case here by writ of error.

From the record, we collect the following facts in this case: David McCausland had been elected, in August, 1838, sheriff of St. Charles county, for the term of two years. On the 26th day of August, 1840, the late sheriff, McCausland, declined to act as collector of the revenue for said county for the year 1840, and refused to execute bond; whereupon, the County Court made an order certifying the fact of such refusal to the Governor of the State, when the Governor appointed and commissioned William N. Fulkerson "collector of the revenue within and for the county of St. Charles, of the the State of Missouri, and do authorize and empower him to discharge the duties of said office according to law; to hold his said office, with all the powers, privileges and emoluments to the same appertaining, until the legal termination thereof."—Dated 21st September, 1840, with the oath of office endorsed thereon, dated 6th November, 1840. On the 13th day of October, 1840, the said Fulkerson, as principal, and the other defendants, as his securities, executed the bond sued on to the State of Missouri, in the penal sum of \$10,000, conditioned as the law directs in case of collectors' bonds. The bond was approved by the County Court. On the trial in the Circuit Court, after reading to the jury the order of the County Court certifying to the Governor the refusal of McCausland to execute bond as collector for the year 1840, and also the bond of Fulkerson as such "collector for the county of St. Charles for the year 1840," the plaintiff offered to read as evidence the commission of the Governor commissioning William N. Fulkerson collector, &c.; to the reading of which, the defendants objected, and the court sustained the objection, and excluded the commission "for the reason that the said commission does not state for what term the said collector was appointed."

The question now presented to this Court is, did the Circuit Court properly exclude the commission for the reason assigned, or for any other reason?

The defendant's counsel in this Court, not choosing to rely upon the reason assigned by the Circuit Court for excluding the commission from

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the jury, place the propriety of the action of that court on the ground that there was no such office as that of collector of St. Charles county, vacated and to be filled by the Governor's appointment; and consequently no paper emanating from the Governor could prove or tend to prove that Fulkerson held an office, the existence of which was forbidden by express law.

Passing by the reason assigned by the Circuit Court, which we think untenable, we shall proceed to examine the question as presented by the defendant's counsel, in this Court. Prior to the revision of 1835, the several County Courts in this State were vested with the power of appointing collectors for their respective counties. The individual appointed was required to execute bond as collector and to take the oath of office, which office he held for the term of two years. By the act of 1835, R. C., p. 535, the sheriffs of the several counties thereafter elected were to be *ex officio* collectors of the revenue within their respective counties, for two years, commencing on the first day of January next ensuing their election. They were required, each year, before entering upon the duties of the office of collector, to give bond and security to the State, to the satisfaction of the County Court, in a sum at least double the amount of the revenue to be collected, conditioned for the faithful performance of all the duties of such office. In the event that any sheriff should neglect or refuse to give bond as required, his office of sheriff was to be immediately vacated, and the County Court were required to notify the Governor of that fact, whose duty it was made to appoint some suitable person to fill such vacancy.

From the foregoing provisions of the act concerning collectors, it will be seen, that although there is a blending of the two offices, that of sheriff and collector, together, which were previously entirely distinct and separate, yet the line of distinction is still visible; for, by the act, the sheriff elected at the general election in August, every two years, enters upon the discharge of his duties as sheriff immediately after the election, but does not take on himself the duties of the office of collector until the first of January after his election. Holding each office for the term of two years after the commencement thereof, his office of collector consequently overreaches that of sheriff near five months. And it is within this period that the duties of collector are most onerous and responsible; for the collector does not receive the assessment until about the first of August in each year, and is required by law to make his collection and pay the same into the State treasury on or before the first Monday in December, annually.

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Between the middle or twentieth of August, when the term of the old sheriff terminates and that of the new sheriff commences, and the first of January following, when the office of collector terminates and a new term commences, who is collector? The statute declares, that the outgoing sheriff shall continue to discharge the duties of the office of collector until the January following. Not, I apprehend, because the collector was sheriff merely, for his powers and duties as such had expired, but by virtue of his being collector, an office still having a legal existence.

Let us apply the principles contended for by defendant's counsel to the case at bar, and see how it will operate. David McCausland was elected sheriff of St. Charles county at the general election for sheriffs in August, 1838. He was required by law to execute bond, and consequently entered upon the duties of his office of sheriff within fifteen days after the receipt of the certificate of his election; this would be about the 20th of the month; and he held the office, under the constitution of the State, for the term of two years, and until his successor was qualified. He became, and took upon himself the duties of the office of collector of the revenue on the first day of January, 1839, and held the office for two years. At the next general election for sheriffs, which took place on the first Monday in August, 1840, another individual was elected sheriff, and on or before the 20th day of the month, executed bond entered upon the duties of the office of sheriff, but did not become collector until the first of January following. The tax book for 1840 had not come into the hands of McCausland, and he, not finding it his interest to collect the revenue for the commission or compensation allowed by law, refused to execute bond as required, whereby a vacancy occurred in the office of collector. If, under this state of facts, there was no vacancy whereby an appointment could be made for the collection of the revenue, the State would truly be in a dilemma. She could not sue McCausland on his bond as sheriff for failing to collect the revenue, and she could not sue him as collector, inasmuch as he had given no bond as such. His successor would not be liable, for his office of collector had not commenced. Accordingly, no one would be liable, and no one could be made liable, for no one could legally be vested with the authority of collecting the revenue for 1840. Public policy would forbid such a construction of the law, if it were not obvious that such a construction arises from a misapprehension of the statute.

We hold, therefore, that the office of collector exists after the termination of the office of sheriff, and thus existing, a vacancy can take place. We maintain that the refusal of the late sheriff, McCausland, to execute

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bond as collector, under the circumstances, vacated the office of collector, and vested in the Governor the power of appointment.

That no vacancy took place in the office of sheriff, by reason of the refusal of the late sheriff to execute bond as collector, because his former office had terminated by law, and a sheriff legally appointed and qualified was in office—and that the appointment of collector by the Governor was in conformity with law,—see the case of Howard vs. State, 8 Mo. R., 361.

The counsel for the defendants contends that the bond on which the suit was brought recites the fact that Fulkerson was collector, and therefore it was unnecessary to prove his appointment by the Governor; consequently no error was committed in excluding the commission. It was necessary to establish the fact that Fulkerson was collector. To do this, the plaintiff might have relied on the estoppel in the deed; or she might show it by the production of the commission, or otherwise. Any of these modes were allowable to her. If she thought proper to adopt one, and the court improperly prevented her from the benefit of it, it was error in the court, and it is no answer in this Court to say that other modes of proof were open to the party complaining of this error.

The commission was admissible, although it did not state expressly for what year the collector was appointed. It might be presumed from the face of the commission; and if not, parol evidence was admissible to show for what year the commission empowered him to act.

For the foregoing reasons, the judgment of the Circuit Court was erroneous, and the other Judges concurring herein, the judgment is reversed and the cause remanded.

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HARRISON vs. STATE OF MISSOURI.

A court has no power to amend or alter its judgment after the close of the term at which such judgment was rendered.

ERROR to Saline Circuit Court.

HAYDEN, for Plaintiff in error, insists:

1. That the original judgment and execution thereon issued were void, for want of jurisdiction



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*Harrison vs. State of Missouri.*


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of the court to render judgment for the amount of the fine adjudged against defendant. See Rev. Code, 338, sec. 61.

2. That the court had no power or jurisdiction at the succeeding term of the court, to revise its proceedings, &c., of the preceding term of the court, so as to give validity to them. See 1 Mo. Rep., 17, Hanly vs. Davis; 2 Bibb Rep., 248, Conn vs. Doyle; 1 Bac. Abr., p. 165; Hyde vs. Curling & Robertson, 10 Mo. Rep.; 2 Tidd, 975.

3. The court had power, and was bound by law to quash the writ of execution which had issued upon the void judgment rendered at the preceding term of the court.

4. The court at the subsequent term, had no more power or authority to diminish the amount of the fine, which had been adjudged against the defendant at the preceding term, than it had, to have increased it, if in the opinion of the court the fine had been less than it ought to have been.

**STRINGFELLOW, Attorney General, for the State.**

1. The defendant being present in court, at the rendition of the judgment, at the October term, and making no objection to the judgment, cannot now complain. The court had jurisdiction of the person, and of the subject matter; the judgment being for too much, does not render it void.

2. The court had power to order a *remittiter* of part of the fine; even at a subsequent term.—The power to punish by fine, being for the protection of the court, has ever been regarded as completely within the control of the court.

3. The objection to the order of the April term, is of no weight. If the court had the power to reduce the fine, that order was proper. If it had not, the objection is improperly made. There should at least be a motion to set aside the latter judgment, or a motion to quash the execution issued upon the same.

**McBRIDE, J., delivered the opinion of the Court.**

At the October term, 1846, of the Circuit Court of Saline county, Harrison was fined \$100, "for a breach of the peace, and for noisy and disorderly conduct in the presence and hearing of the court, directly tending to disturb its proceedings, and to impair the respect due its authority." On a subsequent day of the term, the court made an order remitting forty dollars of the fine, leaving sixty dollars, for which an execution issued returnable to the next April term; at which term the defendant filed a motion to vacate the judgment entered against him and quash the execution which was issued thereon; whereupon the court quashed the execution, entered a remittiter for ten dollars, and ordered an execution to issue for the remaining balance (\$50) of the fine first imposed. The defendant excepted, and has brought the case here by writ of error, and seeks a reversal of the judgment of the Circuit Court on the grounds:

1. That the original judgment and execution thereon issued, were void for the want of jurisdiction of the court to render judgment for the amount of the fine, adjudged against the defendant.

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2. That the court had no power or jurisdiction at the succeeding term of the court, to revise its proceedings of the preceding term, so as to *give validity* to them.

3. The court had power, and was bound by law to quash the writ of execution, which had issued upon the void judgment, rendered at the preceding term of the court.

4. The court, at the subsequent term, had no more authority to diminish the amount of the fine, which had been adjudged against the defendant at the preceding term, than it had to have increased it, if in the opinion of the court, the fine had been less than it ought to have been.

This proceeding was had against the defendant Harrison, under the provisions of of an act of the General Assembly, entitled "an act to establish courts of record, and prescribe their powers and duties." R. C. 1845, p. 338, § 61, which enacts that "every court of record shall have power to punish, as for a criminal contempt, persons guilty of either of the following acts, and no other: first, disorderly, contemptuous or insolent behaviour, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority," &c. Section sixty-two provides "that punishments for contempts, may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of court; but the fine in no case shall exceed the sum of fifty dollars, nor the imprisonment ten days," &c. Section sixty-three declares that, "contempts committed in the immediate view and presence of the court may be punished summarily, &c."

Thus it will be seen, that the Circuit Court has the power to punish summarily, by fine and imprisonment, for a contempt committed in its presence; but the fine not to exceed the sum of \$50, nor the imprisonment ten days.

In imposing the fine of \$100 on the defendant, the Circuit Court clearly exceeded its powers; this was remedied or corrected in part, by the exercise of an unquestioned right of the court, to amend or vacate its judgments, at any time during the continuance of the term, at which the judgment amended or set aside, was rendered. But after the judgment was first amended, by the remission of forty dollars, the fine against the defendant still exceeded the power of the court. The judgment is not absolutely void, as the court had power to punish for the contempt, and thus had jurisdiction, but erroneous, because the fine exceeded in amount the *maximum* prescribed by the statute.

It is contended however, that if the amended judgment of the first

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*Chapman vs. Spicer.*

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term was erroneous, it was competent for the court to correct it at the subsequent term, by entering a remittiter for ten dollars more, thereby reducing the fine to an amount within the legal discretion of the court. We think otherwise. There is not perceived to be any reason for a distinction between a judgment of this character, and one between parties litigant in the court. A judgment between parties, however erroneous, is final after the close of the term at which the same is rendered, and the court might as well undertake to correct an error committed either in law or in fact, at a subsequent term, however remote, in the one case as in the other. It surely would not be sanctioned in a civil case, for the court to undertake after the close of a term, to change one of its judgments, much less can the exercise of any such power be tolerated in a criminal case.

The power of the courts to correct or amend their judgments at a subsequent term, is confined to cases, where the clerk has failed to enter such a judgment as the court actually rendered, and may be more properly denominated the correction of a clerical error or omission, whilst the correction may amount to an amendment of the judgment, as it was entered on the record through the misprision or error of the clerk. See *Hyde vs. Curling, &c.*, 10 Mo. R., 359; 3 Bl. Com., 406; 1 Saund R., 350, a. b.; 5 Burr, 27-30; 1 Strange R., 136.

Judgment is reversed.

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CHAPMAN vs. SPICER.

A motion to exclude depositions, must specify the objections to their being read.

APPEAL from Chariton Circuit Court.

JOHN B. CLARK, *for Appellant, insists:*

1. That Doxey and Compton's depositions were received in evidence without the proof required by law, of the existence of the cause that authorized their reception. Rev. Stat. '45, chap. 48, § 20; Rev. Stat. of '25, Title Depositions, § 4.
2. The damages are excessive.

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*Chapman vs. Spicer.*

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JO. DAVIS, *for Appellee, insists:*

That as Chapman pointed out no particular objection to the reading of the depositions, except a general sweeping one, that this Court will not now hear his objections.

It may be that this Court would be called upon to reverse the case upon a point never brought to the view of the court below—and one which could have been removed in a moment by calling a witness. See *Fields vs. Hunter*, 8 Mo. Rep., 128.

McBRIDE, J., *delivered the opinion of the Court.*

William Spicer brought an action of assumpsit in the Chariton Circuit Court, against Charles A. Chapman, for work and labor, &c., to which he pleaded non-assumpsit, with notice of set-off. Upon the trial had before the jury, the plaintiff offered to read in evidence certain depositions taken in the cause, to which the defendant objected, but the court overruled his objections, and permitted them to be read. After other evidence was given, the jury found a verdict for the plaintiff, whereupon the defendant moved to set the same aside and grant him a new trial, assigning the usual reasons therefor, which the court overruled, to which he excepted and has appealed to this Court.

The only question for the determination of this Court is, whether the Circuit Court improperly overruled the defendant's objection to the reading of the depositions taken in the cause, and permitting them to be read as evidence. The bill of exceptions states that "the plaintiff offered to read in evidence the depositions of James Doxey and Charles Compton, which was objected to by the defendant, the objections of the defendant were overruled by the court, and the said depositions were read to the jury." The record does not contain any written motion to suppress or exclude the depositions, and we are left to conjecture what was the objection which the defendant made to their reading. It is stated in the brief of the defendant's counsel, that the depositions were received in evidence without the proof required by law of the existence of the cause that authorized their reception. Our Statute, R. C. 1845, p. 419, § 20, provides that, "examinations or depositions taken, and returned in conformity to the provisions of this law, may be read, and used as evidence in the cause in which they shall have been taken, as if the witnesses were present and examined in open court, on the trial thereof," specifying six distinct and separate cases in which it is competent to take and read depositions in a cause. The objection taken to the reading of the depositions was a general one, leaving the court to find out if it could, the specific cause of such objection, and thus endeavouring to impose upon

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*Cox vs. Capron.*

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the Circuit Court the burden and trouble of looking out defects, a duty belonging peculiarly to the counsel in the cause. If there really exists any objections to depositions in a cause which would call for a motion to exclude them from the jury, the attorney making the motion has doubtless discovered such defect, and it is imposing no hardship on him to require that in his motion to exclude, he shall assign his reasons, that the attention of the judge may at once be directed to them, and a decision be had on the points which he presents. This will also enable the appellate court to see the question presented and decided by the Circuit Court, and if erroneously decided, to reverse the judgment of that court. It is the only safe mode, by which this Court can legitimately exercise its revising power. The counsel for the defendant having failed to present to the Circuit Court his specific objections to the depositions, that court did right in overruling his motion.

The judgment of the Circuit Court is affirmed.

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**COX vs. CAPRON.**

1. Where a plea suited to the action has been pleaded in proper time, and replied to, the plaintiff is not entitled to judgment by *nil dicit*. If the plea were objectionable, the plaintiff should withdraw his replication and demurrer.
2. Where amendments are made to a plea, if still insufficient, the plaintiff should demur. If he reply, he cannot object to the sufficiency of the plea.

**APPEAL from Clinton Circuit Court.**

**McBRIDE, J.,** *delivered the opinion of the Court.*

James Cox instituted his action of trespass on the case in the Platte Circuit Court against Cyrus Capron for charging him with having committed perjury in a proceeding had before the County Court. The defendant pleaded three pleas; 1st, not guilty; 2nd, statute of limitations; 3rd, justification. The plaintiff took issue on the first, and demurred to the second and third pleas, which was sustained to the second and over-



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ruled to the third. A motion was then made by the plaintiff to strike out certain of the averments in the third plea, which was sustained, and the averments were struck out; thereupon, the plaintiff filed a replication to the third plea, and issue was taken thereto. Under this state of the pleadings, a trial was commenced before a jury, and after the evidence was closed, the defendant withdrew his plea of not guilty, and the court proceeded to instruct the jury, when the plaintiff took a non-suit, with leave to move to set the same aside, which being done, the non-suit was set aside. The plaintiff then applied for and obtained a change of venue to Clinton county.

In the Clinton Circuit Court, the plaintiff moved for a judgment of *nil dicit* against the defendant, because the third plea, as it then existed, was not an answer to the declaration; but the court overruled his motion and he excepted. The defendant then moved the court to set aside the order of the Platte Circuit Court expunging certain averments from his plea of justification, and for leave to reinstate the same in his said plea; which motion was sustained, and the expunged averments were reinstated in the plea: to this, the plaintiff likewise excepted. A trial was then had, and the plaintiff again took a non-suit, which he subsequently moved the court to set aside, but the court overruled his motion, and he excepted, and now brings the case here by appeal.

The evidence given in the cause is contained in the bill of exceptions, and consists of a copy of a record from the County Court of Platte county, showing a settlement by the plaintiff with that court of his accounts as administrator of the estate of Wakefield Cox, deceased. It will not be necessary to state further what the record contains, as the testimony of the witnesses will more clearly show what took place in the County Court.

*James Kuykendall* testified that he was presiding justice of the County Court of Platte county at the time of the final settlement of the estate of Wakefield Cox, deceased, and, upon that settlement, a question arose upon the claim of James Cox, the administrator, the plaintiff, for a credit of \$350 for a claim on public land of Wakefield Cox, deceased, which had been inventoried and charged against said Cox, as administrator. And the justices of the County Court having heard out of doors that said James Cox had sold said claim for \$200, refused to allow him the credit for \$350, until he should account for the proceeds of the sale of said claim; and thereupon, James Cox was introduced as a witness, at the January term, 18—, of said County Court, and at that term testified, among other things,—1, that he had not made a sale of said claim to Al-

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len Chance; 2, that he had not told any person that he had entered the land; 3, that he had not appeared at the land office as a witness for Chance; 4, he had no knowledge of Chance's having gone on the land; 5, he had deposited money in the land office, but for no particular purpose; 6, he had not entered the land at the land office; 7, he had not told any person he had deposited money in the land office to enter the land particularly. The court, not being satisfied at that term, by the request of Cox, it was postponed until the next term of the court, at which term Chance was present and Cox was again sworn, and testified then that he did not know that Chance had gone on the claim, because he had not seen him, and did not know any thing he had not seen. This was by way of explanation of his former testimony on that point. He said, also, at the last time, that he had filed an affidavit in the land office on some collateral matter, but had not been a witness for Chance in the land office. He testified that Wakefield Cox died in 1839; that said claim was worth about \$500. On cross-examination, stated that Cox said in his testimony that he had told Chance he could show him, Chance, a claim that could be got for \$200 and the entrance money. Cox said he had satisfied himself at the land office, that he could not make the affidavit required by law to enable him to enter the land. Cox also said, that he had his mother to support, and the proceeds of the land would enable him to do so more conveniently; that he had not told any one he had entered the land; but told his mother the land was safe. Witness stated that he did not pretend to be able to give all the evidence of Cox on that trial; that he and Cox were not friendly, and that the general character of said Cox in the neighborhood was good up to the time of said swearing.

*Matthew M. Hughes*, another member of the County Court, testified to the same in substance.

*Allen Chance* testified, that he was sworn and gave evidence on the claim of James Cox for a credit for the \$350 for the claim of Wakefield Cox, deceased, on his final settlement of that estate; and that he also heard James Cox give evidence, who stated that he had not made a sale of that claim to the witness, Allen Chance; 2. That he had not told any person that he had entered the land; 3. That he had not appeared at the land office as a witness for Chance; 4. He had no knowledge of Chance having gone on the land; 5. He had not deposited money in the land office to enter that land, or any land in particular; 6. He had not entered the land at the land office; 7. He had not told any person that he had deposited money to enter that land particularly. He further testified, that the testimony of said Cox was not true in the following:—

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That he, witness, had bought the Wakefield Cox claim from said James Cox, for the sum of two hundred dollars, which was in the first instance conditional, but afterwards, when he and Cox went into the land office, Cox then said that the sale must be unconditional; that he would not be responsible for the claim of the heirs; that the \$200 for the consideration of the claim was paid by him to Cox. Secondly, witness said he had heard Cox tell several persons that he had entered the land, and Cox told witness he had told others for the purpose of putting them off their guard, that he might purchase it lower at the block. Thirdly, that Cox had not appeared at the land office as a witness, but had gone with him to enter the land, and made an affidavit to the effect that the heirs of Wakefield Cox did not intend to enter the land. Cox was one of the heirs. Fourthly, that Cox did have full knowledge of his, witness's, going on the land, and he went on by arrangement with Cox. Fifth, gave no direct negative testimony. Sixth, same. Seventh, same.

*James H. Burch* testified, that he learned from Cox that the heirs of said decedant claimed said claim. Said Cox was not a witness to prove said Chance's pre-emption to said claim, but Cox filed an affidavit to the effect that the said heirs would not set up a claim to said claim; he had formed an impression unfavorable to said Cox, from his conduct, &c.

*A. Young* testified, that Saturday before the land sales, which was on the 11th November, 1843, said Cox told him, in Plattsburg, that he had entered the land.

*H. Waller and O. Bruton*, for the plaintiff, testified that they had known him since 1837, and that his character, from that time until this charge, was as good as any man, &c.

The foregoing being all the evidence given in the cause, the court gave the jury the following instructions, to-wit:

1. The only matter for the jury to try in this cause is, was the defendant justified in speaking the words charged in the declaration, and which are admitted as charged by the plea of the defendant.

2. If the jury believe from the evidence that plaintiff did swear before the County Court of Platte as charged in defendant's plea, and that said plaintiff swore falsely in reference to the matter then pending before said court, and that defendant has established by evidence the truth of his plea of justification, then they will find for the defendant.

3. The defendant is bound to prove the truth of the facts set forth in his plea of justification, and if he fail to do so, the jury will find for the plaintiff, and give him such damages as the jury may think him entitled to.

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The plaintiff then asked the court to instruct the jury as follows:

1. That they will exclude from their consideration all the evidence introduced by the defendant in support of his plea of justification.
2. That the defendant has entirely failed to sustain his plea of justification by the evidence.
3. That unless they believe from the evidence that said James Cox was legally sworn in open court, in the County Court of Platte county, by the clerk of said court, then they will find for the plaintiff.
4. That unless the defendant has proved the number of the quarter section of land mentioned in said plea, as in said plea alleged, they will find for the plaintiff.
5. That the defendant is bound to prove that he used the same words charged in the second count, in relation to the plaintiff, and that they had reference to the trial in the County Court, and that they were so understood by those who heard them, else they will find for the plaintiff.
6. That if they are satisfied from the evidence that the plea does not contain all the evidence of James Cox given on the trial in the County Court, as charged in said plea of justification, then they will find for the plaintiff.
7. That if the defendant fails in sustaining his plea of justification, then the plea is evidence of malice in aggravation of the plaintiff's damages.
8. That if they find for the plaintiff, they are not to take into consideration any of the evidence introduced by said defendant in support of said plea, in mitigation of the plaintiff's damages.
9. That the amount of damages is to be estimated by the jury; and that defendant's plea admits the right of plaintiff to recover, unless sustained by evidence.
10. That the same amount of evidence is required in this case, to sustain said plea, as is required upon an indictment for perjury.
11. That unless the jury are satisfied from the evidence that the plaintiff did wilfully, feloniously and knowingly swear false to matter in said trial in the County Court, which was material to the issue, they will find for the plaintiff.
12. That unless the jury are satisfied from the evidence that the quarter section of land mentioned by the witnesses is the same one mentioned in the plea, then they will find for the plaintiff.
13. That if they believe there are two distinct quarter sections of land mentioned in the plea, then they will find for the plaintiff.
14. That unless they are satisfied from the evidence that Wakefield

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Cox, deceased, had a pre-emption right to the land in question, at the time of his death, they will find for the plaintiff.

15. That if they believe the land in question was public land, belonging to the United States at the time of the death of Wakefield Cox, deceased, then they will find for the plaintiff.

16. If the jury believe from the testimony that the plaintiff gave testimony in the County Court, on the final settlement of his accounts as administrator of the estate of Wakefield Cox, deceased, and was called upon by the said court to testify, and this is the testimony in which he is charged by defendant to have sworn falsely, and which is set up in his defence, then they will find for the plaintiff, notwithstanding said plaintiff swore falsely therein, unless they shall further find that, at the time of speaking and uttering the slanderous words charged in plaintiff's declaration by defendant, they were spoken by defendant in reference to said testimony before the County Court, and were so understood by the persons to whom he spoke and uttered said words.

The court gave the 7th, 9th, 11th and 12th of the foregoing instructions, and refused to give the others, to which refusal the plaintiff excepted.

The first question presented for our decision, is the action of the Circuit Court on the plaintiff's motion for a judgment by *nil dicat*. The reasons assigned in the motion are, *first*, because there is no sufficient plea to said declaration—the plea of not guilty having been withdrawn; *second*, because the special plea of said defendant is insufficient in law, and does not contain a substantial defence to the action; and, *thirdly*, because the said defendant has withdrawn the plea of not guilty, without having pleaded any plea that is sufficient in law or amounts to a substantial defence to the action.

Tidd, in his treatise on practice, 1st vol., 609, says, that judgment by *default*, which is an implied confession of the action, is either *non sum informatus*, where the defendant's attorney, having appeared, says that he is not informed of any answer to be given to the action; or by *nil dicat*, where the defendant himself appears, but says nothing in bar or preclusion thereof; and the latter judgment, which is the more usual, is either for want of any plea at all, or for want of an issuable plea, after a judge's order for time on the terms of pleading issuably; or where the defendant pleads a plea not adapted to the nature of the action, or which may be considered as a nullity, or is false and vexatious, or not pleaded in due time or in proper manner.

These rules laid down by Tidd, do not apply to the case at bar; for, in



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this case, a plea suited to the action was put in in proper time, and replied to by the plaintiff, who could not thereafter, with any legal propriety, ask the court for a judgment by *nihil dicit*. If the reasons existed which are set forth in his motion, his proper course would have been to ask leave of the court to withdraw his replication to the plea of justification, and demurred to it. Not having done this, whether the plea was sufficient or not, the court did right in overruling his motion.

The next cause of complaint is, the judgment of the Circuit Court on the defendant's motion to reinstate in his plea of justification the averments expunged by the Platte Circuit Court, and which motion was sustained and the expunged averments reinstated. According to the provisions of the first and second sections of the act regulating practice at law, R. C. 1845, page 826, the Circuit Court is vested with the power to permit amendments in the pleadings, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before final judgment. If the amendment be a matter of substance, the adverse party shall be allowed an opportunity to answer the pleadings so amended. The Circuit Court, then, had the power to permit the amendment, and we cannot see that the power was arbitrarily or oppressively exercised. If the plea, as amended, was defective, the plaintiff should have withdrawn his replication, and filed his demurrer; failing to do this, and permitting his replication to remain in to the amended plea, he cannot now raise the question as to the sufficiency of the plea.

The last question presented by the record, arises on the instructions given and refused by the Circuit Court. Without commenting in detail on the instructions, for they are numerous, it may be sufficient to say, that those given by the court placed the case fully before the jury, and there was no necessity for the plaintiff to take a non-suit, unless he feared a verdict against him, on the merits of his case. Some of the instructions asked for and refused were clearly wrong; others were inapplicable; whilst some might have been given, without affecting the determination of the case.

The judgment of the Circuit Court ought to be affirmed, and the other Judges concurring, the judgment is affirmed.

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*Isaac Woods, et al., vs. the State of Missouri, to the use of Rob't. Rainey.*

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ISAAC WOODS, ET AL. VS. THE STATE OF MISSOURI, TO THE USE OF ROBT. RAINEY.

1. A bond containing more conditions than those required by the statute, is still a statutory bond.
2. A judgment will not be arrested for any cause not sufficient on general demurrer.

### APPEAL from Greene Circuit Court.

#### HENDRICK, for Appellant, insists:

1. The bond sued on, is not such a bond as the statute authorizes suit in the name of the State to the use of Robt. Rainey, by his curator, to be brought on. The bond not being a statutory bond, there is a material distinction between the condition of the bond sued on, and that of the statutory bond, to be given by administrators.
2. The breach found to be true by the jury, is not sufficiently specific, because it does not specify which settlement or settlements, required to be made by the administrator he failed to make; nor does it charge, that the administrator totally failed to settle his accounts. The breach ought to have charged, either a total failure to settle, or specifically charge, which of his settlements required by law to be made, he failed to make. Rev. Stat., page 65; Act prescribing forms of Administrators Bonds, Rev. Stat., sec. 5, page 782; Act to regulate actions on penal bonds.

#### EDWARDS, for Appellee, insists:

1. The defendants having failed to plead, according to the leave given by the court, and having failed to file any plea in answer to said action, the plaintiff was entitled to judgment by default.—Rev. C. 1845, p. 814, § 36.
2. The declaration being substantially good, could only be reached by special demurrer. The motion in arrest, will not reach an objection merely technical, after judgment by default.
3. The judgment cannot be arrested, for any thing that would be cured by verdict. See 1 Saunders, 228, n. (1); 1 Chitty's Pl., 370.; 9 Mo. R., 778.
4. The bond sued on is good. It is true that it contains more than is required by the statute to be recited in the bond of an administrator. The law allows and authorizes a variance from the statute, in bonds given by administrators with the will annexed. See Rev. C. 1835, p. 43, § 15.
5. The bond is substantially good. Rev. C. 1845, p. 43, § 15. See also the argument of this Court, Jones vs. The State of Missouri, 7 Mo. R., 81; Grant vs. Brotherton, ib., 458; The State, &c. vs. Porter, 9 Mo., 356; Henry, et al. vs. The State, &c., ib., 778.

#### McBRIDE, J., delivered the opinion of the Court.

William Townsend, curator of Robert Rainey, brought an action of debt in the Greene Circuit Court, in the name of the State of Missouri, to his use against Isaac Woods, administrator, with the will annexed, of George R. Rainey, deceased, and Henry and Jesse Hickman, as his se-

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curities, on his official bond, to recover the distributive share of the said Robert, who is one of the legatees of said George R. Rainey, deceased. The bond upon which the action was brought, contains the following condition, to-wit: "That if the said Isaac Woods, administrator, with the will annexed, of all and singular the goods and chattels, lands and tenements, rights and credits, which were of the said George R. Rainey, deceased, should make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, lands and tenements, rights and credits of the said deceased, which had or might come into the hands, possession or knowledge of him, the said Isaac Woods, or into the hands or possession of any one for him; and the same, so made, return and exhibit in the office of the Clerk of the County Court for the county of Greene, within such time and in such manner as was or might be prescribed by law; and of all and singular the moneys, goods and chattels, lands and tenements, rights and credits of the said deceased, accruing from or arising out of said estate, which should come to the hands, possession or knowledge of him, the said Isaac Woods; should well and truly administer according to law, and pay the debts of said deceased, as far as the assets in his hands would extend, and the law direct; and further, make, or cause to be made, a just and true account of his said administration, and make true and proper settlements thereof, from time to time, according to law, or order, sentence or decree of any court having competent jurisdiction thereof; and should, moreover, well and truly do and perform all other matters and things touching the said administration, as were or should be provided by law or enjoined on him by the order, sentence or decree of any court having competent jurisdiction, then that obligation should be null and void and of no effect, otherwise remain in full force, power and effect in law." The declaration assigned four breaches of the foregoing condition: *first*, that the said Isaac Woods did not well and truly administer said estate according to law; *second*, that all the debts due by the estate of the deceased, and the expenses of administration, had been paid, and there still remained in the hands of the administrator the sum of \$1900 for distribution, and that the administrator refused to pay the distributive share of said Robert, after demand made by the curator; *third*, that the administrator of said estate had in his hands the sum of \$1900, after the payment of all debts of the estate, and the expenses of administration; that three years had elapsed since the grant of letters of administration, and the County Court of Greene county, where the letters were granted, had ordered said administrator to pay over the money to the heirs and lega-

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tees under the will, or to their guardians or curators, according to their respective rights, but that said administrator had refused to pay over; *fourth*, that the administrator had failed to make settlement of his accounts, from time to time, according to law and the order of the County Court. At the return term, the defendants obtained leave to plead in vacation, but failed to do so; whereupon, at the subsequent term, the court rendered a judgment by default against them, and awarded a writ to assess the damages at the next term. The defendants then filed a motion in arrest of the judgment by default, assigning as reasons therefor, first, because the declaration was insufficient; and, second, because judgment by default ought not to have been rendered in the cause. The motion was overruled, and exceptions taken.

At the next term, a jury was called, who, upon the evidence, found for the plaintiff on the third breach assigned in the declaration, and assessed his damages at \$265 41. The defendants again moved in arrest, for two reasons; first, because the declaration and third breach assigned and found true by the jury are insufficient; and, second, because the bond sued on is not a statutory bond. This motion was overruled, and exceptions taken to the opinion of the court in overruling the same, and an appeal prayed for and granted to this Court.

The points relied on to reverse the judgment, are, that the bond sued upon is not a statutory bond, and that the breach upon which a recovery was had is insufficient. The statute of 1835, which was in force at the time the bond in suit was executed, R. C. 1835, p. 43, sec. 14, prescribes the form of the condition of an administrator's bond. The next section provides that a similar bond, with such variations as the case may require, shall be given by all executors and administrators, with the will annexed. The objection is not that the bond sued upon does not contain every stipulation set forth in the statute above referred to, but that it contains more than the statute requires. To this, there are two answers: first, the statute contemplates a departure from the form given, in cases like the present; and, secondly, the bond is not vitiated by reason of its containing *more* than the statute prescribes. The stipulations in the bond not required by the statute may be rejected as surplusage, and the bond still be regarded as a statutory bond, and sued upon as such. See the case of *Grant & Finney vs. Brotherton*, 7 Mo. R., 458.

The question which might have been raised, on a special demurrer to the assignment of the breach found by the jury, cannot now arise, as the verdict interposes and cuts the defendant off from any technical objec-

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*Hinton vs. Law, et al.*

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tion to the pleadings. No defect in the pleadings is sufficient ground to arrest a judgment which would not be held good on general demurrer.

The other Judges concurring, the judgment is affirmed.

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HINTON vs. LAW, ET AL.

On part owner of a boat cannot sue the others at law for services rendered by him as clerk, under employment by the captain, also a part owner.

ERROR to Howard Circuit Court.

HAYDEN, *for Plaintiff in error, insists :*

1. That Raymond, the master and captain of the boat, *as such*, was authorized to employ a clerk, to render services for the owners of the boat whilst engaged in their service in its navigation of our rivers, and to settle with him for such services, as the agent of the owners, so as thereby to bind them, in like manner as if they had employed the clerk in their own proper persons. See the following authorities: Collyer on Partnership, page 681; Story on Partnership, sections 40, 41, 418, 419 to 452; see Story on Agency, secs. 119, 120.

2. That Raymond having settled the account of Hinton, the plaintiff, for his services as clerk upon the boat, and having given the due bill or note read in evidence upon the trial of the cause, for the sum of money due him, is binding upon the defendants as part owners of said boat, and that they are liable in this action to plaintiff therefor. See 7 Binghams's Rep., 709; Helm vs. Smith, (reported in 20th Eng. Com. Law Reps., p. 301) Collyer on Partnership, 681; 1 Bell's Com., 411; see 1 Dana's Ky. Rep., 68 to 74, Allen ex'r, &c., vs. Shad'r. Burris's representatives; 7 Mo. Rep., 563, Muldrow vs. Caldwell; see Collyer on Partnership, p. 147, 153, inclusive; 1 Chitty, 10, 11; 1 Sand. Rep., 290, 291, Cabell vs. Vaughn.

DAVIS, SHACKELFORD & CLARK, *for Defendant in error, insist:*

1. That no action at law can be supported by the plaintiff, the promise being made to him by himself and others. See Washburn's Digest of Vermont Reps., 557, and cases there referred to; Gow on Partnership, 119; 2 Bos. & Pal., 120.

2. The plaintiff and defendant were partners in the profits and losses of the boat, and no action at law will lie by one against the others till a settlement of their partnership accounts shall have taken place. See Stothart vs. Knox, 5 Mo. R., 112; Gow, 73, 74; Story on Part., 550-1.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought by the plaintiff in error against



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the defendants in error for services rendered as clerk of the steamboat Iatan. It appeared in evidence that the plaintiff and defendants were the owners of the boat on which the services were rendered for which this suit was brought; that the boat was employed in the navigation of the Missouri river; that the master and captain of the boat, who was also a part owner, employed the plaintiff as clerk. The plaintiff commenced his services in June, 1844, and continued employed until the 29th November following, about which time he sold his interest in the boat to the captain. At the time of the sale, the captain settled the account of the plaintiff with him for his services as clerk, and found the amount thereof to be the sum of \$360, for which he executed to him his due bill in the following form:

"\$360. New Orleans, 29th November, 1844, due John Hinton, payable on demand, three hundred and sixty dollars, for value received.

WM. RAYMOND, Capt.

*S. Boat Iatan."*

Raymond, the captain, is not a party to this suit. The boat had done an unprofitable business. Under these circumstances, the court, in effect, instructed the jury that the plaintiff was not entitled to recover.

The question presented by the record is, whether Hinton, the plaintiff, being concerned as an owner in the boat, can maintain an action at law against the other owners.

All consideration of the due bill executed by Raymond to the plaintiff must be thrown out of the case, as Raymond is no party to the suit, and as his authority, if he had any, to settle with Hinton, was not executed in such a manner as to bind the defendants. The case of *Byrne vs S. B. Elk*, 6 Mo. R., 555, is no authority that notes of the character of that now considered is any evidence in this form of action.

No principle is better settled than that, between partners, no account can be taken at law. The rule has its origin in this principle that before an action can be brought for any particular item, the partnership account must be taken, with a view to ascertain whether that item has been affected in any and what degree by the intermediate gains or losses of the partnership business; and as it would be utterly impracticable for a jury to take such an account, a court of law has not the means in its power of administering substantial justice. In the case of *Holmes vs. Higgins*, 8 Com. Law Cond. Rep., it was held that a number of persons associating together and subscribing sums of money for the purpose of obtaining a bill in Parliament to make a railway, were partners in the undertaking, and therefore a subscriber, who acted as their surveyor, could not main-

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tain an action for work done by him in that character, on account of the partnership, against all or any of the subscribers.

The case of *Helm vs. Smith*, 20 Com. Law Cond. Rep., 300, is relied on by plaintiff, in which it was maintained that a part owner of a ship is not necessarily a partner; therefore, a part owner, who, as ship's husband, incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense. In that case, the court lays stress upon its not appearing that the part owners were partners; that they were not necessarily such. Here it appears that the plaintiff and defendants were the joint owners of the boat, employed in the navigation of the Missouri river. The nature of such employment is well known, and the case of *Hewitt vs. Sturdevant*, 4 B. Mon., 459, is an authority to show that the parties concerned in the navigation of this boat were partners. The case of *Wood vs. Steamboat Fort Adams and owners*, 6 Martin's Lou. Rep., 82, N. S., is in point to sustain the ruling of the court below, and contains a vindication of the justice of the rule which prohibits an action growing out of a particular item of the partnership, by one partner against another, until a full account of the partnership has been taken. Judge McBRIDE concurring, the judgment will be affirmed.

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THE STATE OF MISSOURI vs. BUFORD.

It is not necessary in an indictment to negative any exception not contained in the clause creating the offence.

APPEAL from Reynolds Circuit Court.

STRINGFELLOW, *Attorney General, for the State.*

A grocer, under our statute, is defined to be a person authorized by law to sell goods, wares and merchandize, (dry goods excepted) and intoxicating liquors, in quantities not less than one quart. It is not necessary to aver that the liquor was not to be drank at the place of sale; nor that the goods were *not* of the growth, produce or manufacture of the State; nor that they were sold at a store or stand occupied for that purpose; nor is there any force in the objection that the indictment does not negative the right to sell under a merchant's license. An indictment alleging a sale of

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liquor "without any license for such purpose," would be defective. Neither the court nor defendant could know the offence charged. It is not in the words of the act concerning grocers, nor in that concerning merchants.

Under the act concerning merchants, the lowest fine is \$50. Under that concerning grocers, the fine may be as low as \$20. A simple sale of one quart of liquor, constitutes a grocer. But this would not make a person a merchant. The statute defines a merchant to be "*a person who deals in the selling of goods, wares and merchandize, at a store, stand or place occupied for that purpose.*"

An indictment simply charging a sale of liquor "without license," would not authorize a conviction of a person and his punishment as a merchant, without a violation of every principle of law. Such form, then, is not sufficient. Nor would it suffice to aver a sale "*without a license to sell as a grocer or merchant.*" The offences being different in their character, and the punishment being also different, neither the defendant nor court could know the offence charged. Upon a plea of guilty, to such an indictment, how could the court assess the punishment? Would it be as for a violation of the grocer's or merchant's law?

It is manifest that the long and well settled rule prevails in this case, that it is only necessary to charge the offence in the words of the act, and to show such acts as are necessary to constitute the offence, *negating* only such exceptions as are included in the clause creating the offence. That all other justifications or excuses must be pleaded and shown by the accused.

NAPTON, J., *delivered the opinion of the Court.*

This was an indictment consisting of two counts. In the first, it is charged that the defendant, on, &c., at, &c., "unlawfully did directly sell one hundred pounds of coffee, of the value of ten dollars, to divers persons then and there being, without then and there first having a license as a grocer," &c. The second count charged that the defendant "unlawfully did directly sell intoxicating liquors, in a quantity not less than a quart, to-wit: one gallon, &c., to divers persons then and there being, without having a license as a grocer," &c. A motion was made to quash the indictment, on the following grounds: 1. The indictment did not aver that the defendant dealt in the selling of the articles specified, and that they were goods not the growth or manufacture of this State. 2. The indictment did not aver that the selling took place at a store or stand.— 3. The second count is bad, because it did not aver that the liquors were not to be drank at the place of sale. The indictment was quashed, and the Circuit Court granted an appeal.

None of the objections specified to the indictment are, in our opinion, tenable. Only such exceptions as are included in the clause creating the offence, need be negated in the indictment. If others are relied upon by the defendant, they must be pleaded. When the act concerning dram-shops and that concerning inns and taverns were in force, a different form had to be used, because those two laws were anomalous. In each act, an authority to sell liquors in small quantities was given, by

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procuring a license under either law. Neither could be considered as an exception to the other. The law concerning grocers is differently framed. A grocer's license is generally necessary to authorize the sale of liquors in quantities exceeding a quart. To this general rule, there are exceptions stated in the act. Liquors may be sold in quantities exceeding a quart when sold at the place of their distillation, under certain restrictions. They may be also sold at a distance of a mile from any town or village; and they may be sold by merchants. These exceptions are not necessary to be negatived in the indictment, but must be relied on in defence.

Judgment reversed and cause remanded.

## AUSTIN vs. WADDELL.

In an action of trespass to land, the defendant pleaded that he was overseer of a road, on which were bridges—to repair which, he had taken the timber from the plaintiff's land, it being *the nearest unimproved land to the bridges, &c.* Replication that it was *not the nearest unimproved land, &c.* Held, that replication denied both the alleged location and description of the land.

## APPEAL from Lafayette Circuit Court.

YOUNG, for *Appellant*.

LEONARD, for *Appellee*, insists :

1. The averment in the plea that the land on which the trespass was committed, was the nearest unimproved land to the bridges and causeways to be repaired, is a material averment, and contains two distinct propositions; first, that the land was unimproved; and, second, that it was not nearer to the bridges and causeways than any other unimproved land; and both propositions are equally material. Rev. Stat. of 1845, chap. 151, sec. 49.

2. The plaintiff was at liberty to traverse all the facts contained in the plea, but contented himself with traversing the averment in relation to the situation and condition of the land, by negating the very words of the plea in this particular. If, by the averment, the defendant is bound to show not only that the land is nearer to the bridges, &c., than any other unimproved land, but also that the land itself is unimproved, surely a denial of the averment, in the negative of its very words, cannot be an admission of the truth of one of the two propositions that it contains. 1 Chitty's Pl., 7 Am. ed., 636, 643 and 644; Tucker vs. Ladd, 7 Cow. Rep., 450.

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*Austin vs. Waddell.*

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NAPTON, J., *delivered the opinion of the Court.*

This was an action of trespass brought by Waddell against Austin for entering his close and cutting and carrying away his timber. The defendant pleaded not guilty, and a special plea that he was the overseer of a public road, upon which there were bridges and causeways which it was his duty to repair, and that for this purpose he entered upon the plaintiff's close (it being *the nearest unimproved land* to said bridges and causeways) and took and carried away the timber, doing no unnecessary harm, &c. The plaintiff took issue upon the plea of not guilty, and replied to the special plea that the land entered upon was not "the nearest unimproved land."

Upon the trial, the plaintiff gave evidence to show that the trespass was committed upon improved land, and this testimony was objected to by the defendant on the ground that the pleadings admitted the land upon which the trespass was committed to be unimproved land. The court, however, held the testimony to be admissible under the issues, and a verdict was accordingly found for the plaintiff. The defendant took exceptions and brought the case here by appeal.

The only question is, whether the replication of the plaintiff put in issue both the situation and condition of the land, as asserted in the plea, or whether it is to be understood as applying only to the former, and impliedly admitting the condition of the land to be such as the defendant had affirmed it to be. The statute which regulates the duties of overseers of the road, authorizes the overseer to cut timber for the construction of such bridges and causeways as it becomes his duty to put up, upon the unimproved lands lying nearest to such bridges or causeways. When the defendant in his plea asserted that the land upon which the trespass was committed was the nearest unimproved land to the bridges and causeways he had to construct, he undoubtedly meant to affirm two distinct facts, although they were clothed in one general proposition.—These facts were, first, that the land upon which he committed the trespass was unimproved; and, second, that it was the nearest land in that condition to the bridges and causeways. If these two distinct allegations were not contained in the general proposition asserted by the plea, it was clearly defective, for both were essential to the defence. The plaintiff was then at liberty to deny either or both of these assertions.—His denial was couched in the same general terms in which the assertion was conveyed. It was a mere negation of the very language employed by the defendant to convey the affirmation of both facts. The affirma-



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*Austin vs. Waddell.*

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tive proposition is, that the land was the nearest unimproved land; the negative of this was, that it was not the nearest unimproved land. The first embraces an affirmation of two facts, and the second must therefore be a denial of the same. There is no more propriety in limiting the operation of the negative "not" to one or other of the propositions, than there would be in requiring a repetition of the conjunction "and," in order to make the plea an affirmation of both propositions.

Let us suppose, by way of illustration, that it is asserted that the Planter's House is the largest painted brick dwelling house in St. Louis, and that this assertion is traversed in the very words of the assertion. Here there is a succession of epithets, each of which is affirmed to be applicable to the subject matter to which they have been applied. It is asserted that the Planter's House in St. Louis is a dwelling house, and that it is constructed of brick, and that it is painted, and that it is the largest building of this description in the city. All of these assertions or propositions might be conveyed in the distinct and separate form in which they have just been placed, but they may be made in the same connected and general proposition we have at first supposed. This general proposition, we will suppose, is denied in the same general terms by which the assertion is conveyed. Each fact might be denied separately. It might be denied that the Planter's House was a dwelling house, or that it was a brick house, or that it was painted, or that it was the largest house of this description in St. Louis. But if the affirmative proposition can be conveyed in the general terms above specified, the negative proposition can be also conveyed by a negation of those terms. And if the negation be made in this way, how can such negation be limited to the first or any succeeding fact of the general proposition? There is no principle in the construction of our language which limits the application of the particle of negation to the epithet immediately succeeding it. If there is, the same principle must limit the application of the affirmative to the proposition first following it.

To make the illustration plainer, let us omit the superlative degree in the epithets chosen, and let the assertion be merely that "the Planter's House in St. Louis is a large painted brick dwelling house." Here the assertions are the same as before in relation to the character and quality of the house and the materials out of which it is built, but there is no comparison made relative to its size. If this assertion be denied in the same general terms in which it is conveyed, how shall we limit the negation to any one of the characteristics which are attributed to this building? Shall we say that such a negation only denies the size of the building and admits all the other peculiarities which it is affirmed to pos-

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*Austin vs. Waddell.*

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sess? or shall we say that it is applicable to some of the other propositions, and not the one which avers the size of the building?

The defendant here in his plea asserts, that the land upon which the trespass was committed was the nearest unimproved land. When that proposition is denied by saying that it is "not the nearest unimproved land," why not apply the negative to the condition of the land as well as to its locality? Is the negative to be confined to the epithet immediately following it?

Suppose that the defendant, instead of asserting that the land upon which the trespass was committed was the nearest unimproved land, had asserted that was "unimproved land nearest to the bridges and causeways," would this alteration of the order of words have altered his meaning? I suppose not. Then, if the plaintiff had replied that it was "not unimproved land nearest to the bridges," what construction would have been put upon such negation? The negation is just as broad as the affirmation. If the one be good to assert two propositions, the other must be sufficient to deny them.

As this seems to be a question rather philological than legal, and the meaning of words depends upon usage, which has been pronounced the "*jus et norma loquendi*," I may be excused for illustrating my views by an additional example. Let us suppose that the plaintiff, instead of asserting in his replication that the land was "not the nearest unimproved land," had said, "I deny that the land trespassed on is the nearest unimproved land." This, it is true, would not be formal in a replication, but the question is not now about the *forms of pleading*, but the *meaning of words*. It must be admitted that the denial I have just put is precisely the same in substance as that which is used in the replication. And could there be any doubt about the meaning of such a denial? It is as broad as the assertion of the defendant, and if the defendant's plea contains an affirmation of two propositions, it must follow that such a replication as this would be a denial of both propositions.

I attach no importance to the argument that the plaintiff's replication, if understood to deny both propositions of the plea, would make an issue upon two negatives. If the replication was defective in this particular, it should have been demurred to. The question is not whether the replication is good, or whether the plea is good, but *what issue was in fact made?* My opinion is, that the issue was both upon the condition and location of the land, and that the plaintiff had a right to show that the land upon which the trespass was committed was not of such a character as the defendant had asserted it to be.

The other Judges concurring, the judgment is affirmed.

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*Chinn vs. Stout.*

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## CHINN vs. STOUT.

A widow having elected to take the personal estate which came to her husband by means of the marriage, under the 3rd section of the act concerning dower, in lieu of her dower, cannot have the real estate of her husband sold to pay his debts, so as to exempt the personal estate thus selected by her.

## APPEAL from Monroe Circuit Court.

HOWELL, for *Appellant*, insists:

1. The object of the last clause of the third section of the dower act, is, that when there is no issue of the last marriage, and the marriage relation is dissolved by the death of the husband, the wife shall occupy, if she so desire, a more eligible position in regard to the property she brought into the marriage, than where there is issue, and the act should be liberally construed to carry out said intent of the Legislature.

2. The election by the widow, as in this case, is, and should be, looked upon as a sale by the widow of her dower in the estate of her husband, and the consideration by her given for it is no less than the one-third of the real estate of her husband for her life; the right to remain in the dwelling house, and the plantation thereto adjoining, free of charge, till her dower is assigned; the 200 dollars allowed to widows free from the claims of creditors, and other property allowed her by the administration act, &c., &c.; none of which is liable to creditors, but goes to their benefit, and to the benefit of the heirs of the husband, by her election to take the property which remains, that came to the husband by her.

3. After an election by the widow, as in this case, the two estates previously united by means of the marriage, again become separative, having no claims the one upon the other.

4. The two estates becoming so separative, the wife's estate, withdrawn by her election and at the price of her dower in her husband's estate, can only be disturbed by creditors of the husband, and by them only after they have first exhausted his estate, real as well as personal.

5. The property taken by the widow is only the remaining property which was brought into the marriage by her. It is property which has received no benefit from the debts of the husband. It is property which was not purchased with the debts which the husband owes; as, in this case, one of the largest debts owing by the estate, as the record shows, is a debt which accrued for the purchase of a part of the identical land which is asked to be sold for the payment of that and other debts.

6. This is not a contest between the widow and the creditors of the husband, but between her and the heirs of the husband, as to which fund should be first taken for the payment of the debts.

7. The rights surrendered by the widow, in this case, as in most other cases they will be, were valuable, and the heirs of the husband have had the benefit of them, in their application to the payment of the debts, and now to take her property for the payment of the debts, and in exoneration of the land, without indemnifying her in any way for the rights so by her surrendered, for the privilege of taking back her remaining property, would be grossly unjust, and could not have been intended by the Legislature.

To hold that the property so taken by the widow must be sold before the husband's lands, for the payment of his debts, would be virtually repealing the third section of the dower act, or driving it out of use, as the widow is required to make her election in six months, and creditors have

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*Chinn vs. Stout.*

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three years to prove up their debts; and as it is not unfrequently the case that the bulk of the husband's estate consists in land, and the wife's in negroes and other personal property.

But if the widow's property so taken can be made subject to the debts before the land is exhausted, it should only be in a rate of contribution with the land in proportion to value.

The objection in the County Court to the making of the order for the sale of the land, does not appear to be made by any person having any interest in the estate, or representing any person having an interest.

The objection to the order of the County Court for the sale of the land, is not made in the name of Alexander Chinn's heirs, nor does it any where appear that Stout, the appellee, is the guardian of the infant children of said Alexander Chinn.

*WILLIAMS, for Appellee, insists:*

That the judgment of the Circuit Court is right, and ought to be affirmed,

1. Because the real estate of a deceased person cannot be sold for the payment of debts until all the personal estate shall have been disposed of for that purpose first, except by substitute or by order of the court. See Mo. Stat., p. 52, secs. 8, 14.

2. That when the husband shall die, having children by a former marriage but no child by his last wife, his widow may, in lieu of dower, elect to take, in addition to her real estate, the slaves and other personal property, in possession of her husband at the time of his death, that came to the husband in right of the wife by means of the marriage; but she takes the personal property, subject to the payment of the husband's debts. See Mo. Stat., (Dower) p. 228, sec. 3.

*Scott, J., delivered the opinion of the Court.*

Alexander Chinn was twice married, and died in 1838 or '9, leaving children by his former, but none by his last wife, Mary Chinn, the appellant. By his last will and testament, he made a provision for the appellant, which she, in conformity to law, renounced, and elected to take her dower, under the third subdivision of the third section of the act concerning dower, R. C. 1835. No executor being named in the will, administration, with the will annexed, was committed to Mary Chinn, the appellant. The personal property remaining to the estate, after that taken by the appellant, as above stated, in lieu of the provision made for her by the will and of her dower, being insufficient to satisfy the debts due by her deceased husband, instead of selling the slaves and personal property taken by her, as above stated, for that purpose, she applied to the County Court for a sale of the real estate. The County Court made an order of sale, and, on an appeal to the Circuit Court, that order was reversed, and the cause is brought here.

The question in the case is, whether the personal property and slaves given by the third subdivision of the third section of the act concerning dower are to be freed from the payment of the debts until the real estate

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*Chinn vs. Stout.*

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of the deceased is exhausted, or whether, like other personal estate, they are first to be applied to that purpose, before his land can be subjected to the liability.

The subdivision referred to enacts, that when a husband shall die leaving a child or descendant, but not by his last marriage, his widow may, in lieu of dower, elect to take, in addition to her real estate, the slaves and other personal property, in possession of the husband, that came to him in right of the wife by means of the marriage. The fourth section of the act provides that this provision shall be subject to the payment of the husband's debts.

The common law being the foundation of all our legislation, statutes must be construed in reference to it. It is a well settled principle at common law, that the personal estate is the proper fund to pay debts and legacies, and in general is first to be applied, though the real estate may be charged. *Lapton vs. Lapton*, 2 J. C., 627. Indeed, this principle, though not expressly declared, is clearly deduced from the provisions of our code. In *Stokes vs. O'Fallon*, 2 Mo. R., it was held that the personal estate was the primary fund for the payment of debts, and that when a widow took a portion of the personal estate as her dower, subject to the payment of debts, the real estate could not be applied in exoneration of the personalty. The slaves taken by the appellant, under her election, originally belonged to her, but by the marriage they became the absolute property of the husband. If she afterwards elected to take them as her dower, and took them subject to the payment of debts, and as they were the primary fund for the payment of debts, it is hard to discover any ground on which she can base her right to withhold them from the burden to which they are subjected by law, and resort to the land for the payment of the debts.

The law has made one general provision for all widows. It has placed them all on the same footing as to dower, and if there is any inequality in their condition, it is owing to the fortunes of their husbands, and not to the law. Under particular circumstances, it is permitted to widows to renounce this general provision, and to take another kind of dower.— This is not obligatory on them. It is their own voluntary act, and if it should afterwards turn out that their election was not as wise as was expected, they can complain of none but themselves. Ample time is allowed them to make their election.

Judge McBRIDE concurring, the judgment will be affirmed.



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*Masterson, Ex'r., &c., vs. Ellington.*

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MASTERSON, Ex., &c., vs. ELLINGTON.

1. When an appeal is taken from the judgment of a justice of the peace, after the day of trial, and notice of such appeal is given to the appellee, it is irregular to try the cause at the return term. And if judgment be rendered at the return term against the appellee, such judgment will be set aside at any subsequent term.
2. To entitle the appellee to set aside such judgment, notice must be given to the appellant.

APPEAL from Platte Circuit Court.

JONES & EDWARDS, *for Appellant, insist:*

1. That at the time the court below set aside the judgment and reinstated the case on the docket, Hunter was dead, and that no administration had at that time been granted on his estate, and he could not therefore have had notice of the action of the court; and that therefore the court below had no power to set aside the judgment and reinstate the case. 9 Mo. R., 363, Caldwell vs. Lockridge.
2. That a court has no power at a subsequent term to set aside a judgment duly entered at a prior term thereof.
3. That the bill of particulars filed in this cause is insufficient, because it does not apprise the defendant of the cause of action.
4. That the evidence offered by the plaintiff and objected to by the defendant ought to have been excluded by the court.
5. That the court erred in overruling the motions of the defendant in this case.

SCOTT, J., *delivered the opinion of the Court.*

Ellington sued Hunter in a justice's court on an account, and recovered a judgment. After the day on which the judgment was rendered, Hunter appealed to the Circuit Court, but failed to give notice of his appeal to Ellington, in consequence of which, Ellington not appearing in the Circuit Court, was nonsuited. After the term in which the nonsuit was entered, Ellington moved the court to set it aside, for the reason that he had no notice of the appeal. This motion was sustained. At the time of this action of the court, Hunter was dead. The suit was afterwards revived in the name of Masterson, the executor of Hunter.—After this revival of the suit, Masterson moved to vacate the order setting aside the nonsuit, on the ground of the death of his testator and the want of notice. This motion was overruled, and a trial being had on the merits, Ellington recovered a judgment for \$155-100. The defence was a certificate of bankruptcy. Evidence whether the items of the

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*Parsons vs. J. & H. Wilkerson.*


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account were contracted before or after the application for the benefit of the bankrupt law was submitted to the jury. Objections were taken to the account filed with the justice, but no motion was made for a bill of particulars.

The case of *Caldwell vs. Lockridge*, 9 Mo. Rep., 362, has no application to this case. It is very true, that after the term at which a judgment is rendered, that judgment for the error of the court cannot be altered or amended. But when there is an error of fact, such as was formerly corrected by writ of error, *coram vobis*, and which made the proceedings irregular, for that irregularity, a judgment might be revoked at a subsequent term. The effect of a writ of error *coram vobis* is now in practice in most cases obtained by a motion. The judgment against *Ellington* being irregular, was subject to be set aside; and if notice of the motion for that purpose had been given, it would have been properly set aside. But, inasmuch as *Masterson*, the executor of *Hunter*, had the propriety of the action of the court in setting aside the nonsuit contested in his motion to vacate that order, and as that motion was in reality a rehearing of the former motion, and as this Court sees that if this judgment is reversed for the want of notice of the first motion, and a new trial ordered, it must result as it has already resulted, there can be no pretence for its interference. Why reverse this judgment for not giving notice of the motion to set aside the nonsuit, when it clearly appears that that motion, on notice given, must be sustained?

The evidence of the indebtedness of the defendant, and the time of its accruing, was properly left to the jury. If the account of the plaintiff did not sufficiently apprise the defendant of the nature of his claim, he might have had a bill of particulars.

The other Judges concurring, the judgment will be affirmed.

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PARSONS vs. J. & H. WILKERSON.

1. A bill to enjoin a judgment at law, must make a transcript of the judgment an exhibit in the cause.
2. Such omission may be taken advantage of by demurrer, or as a ground to dismiss the bill on the final hearing.

*Parsons vs. J. & H. Wilkerson.*

APPEAL from Lincoln Circuit Court.

CARTY WELLS, *for Appellant, insists:*

1. There is no equity in the bill.
2. Complainant had an adequate remedy at law. He could have moved to set aside the judgment for irregularity, or he could have had a writ of prohibition.
3. The bill was defective in not exhibiting the judgment complained of.
4. The answer denied some of the material allegations in the bill, and there was no proof to sustain them.

W. M. CAMPBELL, *for Appellees, insists:*

1. If the statements contained in their bill of complaint are true, they are entitled to the relief asked for by them. 14 Johns. Rep., p. 121, *Borden vs. Fitch*; 19 Johns. Rep., p. 39, *Bigelow vs. Stearnes*; Rev. Stat. of Mo., 1835, p. 366.
2. The answer admits the prominent facts stated in the bill, and does not deny the other statements of the bill in such a manner as to prevent the complainants from obtaining a decree.
3. The plaintiff sets up in his answer certain affirmative matters in avoidance of the bill, which are denied by the replication; and it is then his duty to introduce evidence to sustain his affirmations; but he failed to do so, and the court properly took the bill for confessed as to all material points.
4. When, as in this case, the defendant asserts the existence of certain records, proceedings and facts, as the ground of his defence, and the complainants deny the existence of such records, proceedings and facts, the burden of proof in relation thereto is thrown on the defendant and not on the complainants who deny, and the complainants cannot be lawfully held to prove negatives.

McBRIDE, J., *delivered the opinion of the Court.*

John and Herrod Wilkerson filed a bill in the Lincoln Circuit Court alleging that Parsons had obtained a judgment against them before a justice of the peace of said county on a proceeding by garnishment in a case wherein said Parsons was plaintiff and one Elijah Wilkerson was defendant, under the pretence that they were indebted to said Elijah; that the judgment against them was had without any notice whatever having been given them, and that they had no notice of the said judgment until it was too late for them to take an appeal, and that the said Parsons sued out execution against them on the judgment thus obtained, at a period of time when there was no competent tribunal in session to arrest or stay the proceedings by any means known to the common law; that they were not in fact or in law indebted at the time of the rendition of said judgment against them to the said Elijah Wilkerson in any sum whatever. They make Parsons a party defendant to their bill,

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*Parsons vs. J. & H. Wilkerson.*

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and pray that an injunction may issue restraining the collection of the said judgment. An injunction was granted them. Parsons answers, admitting his judgment against Elijah Wilkerson and his subsequent judgment against John and Herrod Wilkerson by a proceeding had against them, but whether the said judgment was rendered against them without any notice in fact, he is not advised; and whether they had notice in law of the proceedings against them, he refers to the proceedings had before the justice of the peace who rendered the judgment. He charges that the complainants were, at the date of the judgment against them, indebted to Elijah Wilkerson in a sum greater than the judgment. He insists that his judgment is regular, and that he had a right in law to the same.

To the answer, the complainant filed a general replication.

The parties went to trial on the bill, answer and replication, when the court rendered a decree perpetuating the injunction and awarding costs against the defendant, from which decree the defendant appealed to this Court.

The bill is clearly defective in not making an exhibit of a transcript of the judgment sought to be enjoined, and no decree should have been rendered on it. When a party seeks to enjoin a judgment at law, the inviolable practice, so far at least as our experience extends, is to make a copy of the judgment an exhibit in the bill, for that is better evidence of the existence of the judgment and the proceedings leading to it than the statement contained in the bill.

It may be said, that if the bill be defective for the reason above assigned, the defendant should have demurred, and not slept upon his rights until after a decree has been rendered against him, and then be permitted to come in and avail himself of the omission in the bill. This would perhaps be the better practice, and the suggestion would have its proper weight, provided we could see clearly from the bill and answer that the decree was for the right party on the merits. But, without intending to express any opinion on the merits, we would premise whether there are not material allegations in the bill flatly and positively denied in the answer, and no evidence was offered by the complainants to sustain them. If so, the bill should have been dismissed on the hearing.

The decree of the Circuit Court ought to be reversed, and the other Judges concurring, the same is reversed, and the bill dismissed without prejudice.

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*Wooden, use of, &c. vs. Butler.*

WOODEN, USE OF, &C. VS. BUTLER.

An agreement signed by A and B, reciting that A had leased certain premises to B, for the term of one year, with the privilege of another year—in which for such lease B promises to pay at the rate of \$200 per annum quarterly, and if not paid A to re-enter, and have a lien on the stock of goods in the store, is assignable at law under our statute.

ERROR to Hannibal Court Common Pleas.

GLOVER & CAMPBELL, *for Plaintiffs in error, insist :*

That the judgment of the Circuit Court should be reversed,

1. Because the Court of Common Pleas erred in excluding the written lease from the jury, upon the supposition that the same was assignable at law. See 1st Dana's Reps., p. 594; 6 Mo. Rep., p. 509. It seems quite clear to us, that the article of agreement between Butler and Wooden, is neither a bond or note within the meaning of the statute. 2 Littell, 167; 3 Bibb, 441; 2 Bibb, 233.
2. Because the lease was proper legal evidence, to go before the jury. Rev. Code 1845, p. 668, § 12. The instrument reserving the rent, was not under seal; assumpsit for use and occupation therefore was the proper remedy. 14 Mass. R., 97; 8 Mo. R., 213; 8 Mo. R., 738.

RICHMOND, *for Defendant in error, insists :*

1. This suit is for recovery upon a written instrument, and no *profert* thereof is made in the declaration. Rev. Stat. Mo., 812.
2. The paper offered to be read in evidence, is in effect a note for the payment of money, and having been *assigned* before suit, the action should have been in the name of Webb, the assignee. Jeffries vs. Oliver, 5 Mo. R., 433; Rev. Laws Mo., 190.
3. But if the writing is not a note, it is a *lease*, and being such the *rent* (which alone is sued for) is assignable without the aid of the statute concerning "bonds and notes." Promises to pay rent run with the land, and are assignable with the lease. Marle vs. Flake. 3 Salkeld, 118; Demerset vs. Willard, 8 Cow., 206-12, and cases there cited. Bacon's Abridgement, title Covenant, letter e, p. 71, 74.
4. The paper could be of no use to show occupation by the defendant, *after the expiration of the term*, as no other evidence was offered, and the suit was brought to recover so much money only, as was due by the written article.

McBRIDE, J., *delivered the opinion of the Court.*

Wooden brought an action of assumpsit in the Hannibal Court of Common Pleas, against Butler, for use and occupation of certain leasehold property. The defendant appeared and pleaded the general issue, and demurred at the same time to the plaintiff's declaration. The demurrer was argued, overruled and withdrawn. At the November term, 1846, of said court, the issue joined was submitted to a jury, and on the trial of



*Wooden, use of, &c. vs. Butler.*

the cause, the plaintiff offered to read as evidence to the jury, the following article of agreement, to-wit:

"This agreement witnesseth: That George Wooden has rented unto — Butler thereof, the store and houses, on the lot pertaining thereto, being that part of lot number one, in block number eight, in Hannibal, lately owned by James Convoy, for the term or period of one year, from and after the 16th day of December last past, with the privilege of another year thereafter, at the price and rate of two hundred dollars, payable quarterly. And the undersigned, A. J. Butler, agree for the use and occupancy of the said premises, to pay to the said Wooden, the said sum of two hundred dollars per year, and to pay the same in four instalments or quarterly payments of three months from the said 16th day of December last past; and in default of such payments punctually to be made, they do further agree that the stock of goods then in the said store, shall be subject and bound for the same, and that the said Wooden shall have the right to re-enter and take possession of the premises. In witness whereof, we have hereunto set our hands to duplicate copies of this agreement, and retain one each; this 13th day of January, 1844.

A. J. BUTLER,

G. WOODEN."

Teste, JOHN P. STEWART.

On the back of which agreement, is the following assignment, to-wit:

"I assign the within to A. B. Webb, for value received. March 23, 1844.

G. WOODEN."

It was admitted by the parties, that the assignment on the said writing to Webb, was made by Wooden, and the said lease was signed by Wooden and Butler respectively. The defendant objected to the reading of the lease as evidence, in the cause, because the assignment divested all right of action in the plaintiff. The court sustained the objection, and excluded the lease from the jury: thereupon the plaintiff suffered a nonsuit, with leave to move to set the same aside, which he subsequently did; but the court overruled his motion, to which he excepted, and has brought the case here by writ of error.

The only question is, did the Court of Common Pleas correctly reject the lease offered in evidence? We think the Court of Common Pleas decided correctly, for divesting this agreement of all verbiage and it amounts to nothing further than a direct undertaking on the part of Butler to pay to Wooden the sum of two hundred dollars, in four equal instalments, at the end of every three months. What is contained in the writing, concerning the rent of the house, &c., is nothing more than the setting out of the consideration of the undertaking of Butler, to pay the

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*Wooden, use of, &c. vs. Butler.*

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\$200. It is similar to an obligation to pay the hire of a slave, where it is expressed in the instrument, that it is for the hire of a slave, for a certain period of time; or a note or bond, given for a horse or other chattel, wherein it is expressed that the obligor has purchased of the obligee a bay horse, seven years old, fifteen and half hands high, which the said obligee warrants to be sound; he the obligor, promises six months after date, to pay to the said obligee, the sum of fifty dollars, &c. We distinguish this case from the case of *Curle vs. Pettus*, 6 Mo. R., 497, which was a petition in debt, brought upon a bond covenanting to pay a stipulated sum for the hire of slaves "for one year, who are to be clothed, taxes paid, and returned" to the owner. The court held this to be an obligation, not only to pay a certain definite sum of money, but also a stipulation for clothing, paying the taxes and return of the slaves, and consequently, not a direct undertaking to pay money, within the meaning of our General Assembly. The decision is based upon one given by the Court of Appeals of Ky., reported in 4 Bibb, 252, where the instrument of writing sued upon, was very similar to the one then before this Court. But whether the action was brought to recover the value of the clothing, as well as the hire, is not stated. If the plaintiff sought to recover both, then clearly the decision was right; but if the action was to recover only the amount of the hire, and this was all that the plaintiff claimed, then we cannot see the propriety of turning him out of court. His action to recover only the hire, would be a waiver of his right to have damages of the defendant for his failure to clothe the slave according to contract.

In the case now before us, Butler does not bind himself to do any other act than the payment of the \$200, which his omission to do, would give Wooden a right of action against him. The clause giving the right to re-enter upon the premises, could not be made the foundation of an action, neither could the lien given upon the goods, for the payment of the rent, authorize Wooden to sue in covenant.

This being the character of the instrument offered in evidence, and the same having been assigned before the commencement of the action, its introduction as evidence, could not conduce to establish the plaintiff's right to recover. The legal effect of the assignment was to vest in Webb the right of property in the agreement, and under our statute the suit should have been brought in his name, and not in the name of Wooden for his use. Rev. Code 1835, p. 104; *Jeffries vs. Oliver*, 5 Mo. R., 433.

The judgment of the court below is affirmed.

*Bank of Missouri vs. Wright, et al.*

## BANK OF MISSOURI vs. WRIGHT, ET AL.

The payable of a note negotiable under our statute is not entitled to recover four per cent. damages upon a protest; such damages would only be allowed in case the note had been negotiated.

## ERROR to St. Clair Circuit Court.

## EDWARDS, for Plaintiff, insists:

That the note on which the suit was brought being given for "value received, and payable without defalcation," was the same in effect as an inland bill of exchange, and as such the holder was entitled to four per cent. damages upon protest for non-payment. See Rev. Stat. 1845, p. 173, 174, secs. 8, 15, 16.

## NAPTON, J., delivered the opinion of the Court.

The Bank of Missouri brought suit against the defendants in error upon the following note:

\$240.

*Springfield, 13th April, 1846.*

Four months after date, we promise to pay to the Bank of the State of Missouri, or order, two hundred and forty dollars, for value received, negotiable and payable at the branch of said Bank at Springfield, without defalcation, with seven per cent. interest per annum after due. Signed:

THOMAS F. WRIGHT,

WM. BROWN,

J. C. GREENWELL."

The plaintiff had a judgment for the amount of the note and interest, but also claimed damages at four per cent. as upon an inland bill of exchange. The court refused to allow the damages, and the plaintiff excepted.

The fifteenth section of the act concerning bills of exchange declares, that notes of the character of the one here sued on shall have the same effect and be negotiable in like manner as bills of exchange; and the eighth section of the same law gives the damages upon protested bills of exchange, drawn upon any person within this State, at four per cent.—But where the note is not actually negotiated, although it may possess the qualities of a negotiable instrument, we presume the Legislature did not design to give any damages. Here the note is payable to the Bank

*Moss vs. Craft, et al.*

of Missouri, and the Bank seems never to have parted with it, as suit is instituted by her as the holder. In such case, there can be no ground for damages.

The other Judges concurring, the judgment is affirmed.

MOSS vs. CRAFT, ET AL.

1. A bill for an injunction releases all errors in the proceedings at law sought to be enjoined.
  2. An execution on a judgment against a principal and surety, levied on property of the principal, which cannot be sold for want of bidders, may still be levied on the property of the surety.
  3. Although the constable by failing to sell such property becomes liable, yet the surety is not discharged.
- Ques.—In such case, would the constable be liable to the surety?

APPEAL from Jefferson Circuit Court.

KING, for Appellant, insists:

1. The Circuit Court erred in dissolving the injunction, because of the insufficiency of said constable Brown's return in the service and return of the summons against Moss and Shipton, when issued by Wilson, justice of the peace, as to appellant; the Circuit Court, by its decree, should have perpetuated the injunction, because of its insufficiency of the constable's return. See the 1st vol. of Mo. Rep., (republication) *Charless vs. Marney*, 382, 383.

2. The Circuit Court erred in not perpetuating the injunction so far as Moss, the appellant, was concerned, because the judgment by the justice against the appellant was not only erroneous and therefore voidable, but because Moss, the appellant, had no notice of the proceedings against him before Wilson, the justice of the peace. The judgment against him, for this cause, was absolutely void, and cannot be enforced, either in law or equity, as a judgment. As to this point, see the case of *Perryman, et al. vs. the State*, to the use of Relfe, adm'r, &c., 8 vol. Mo. R., p. 209.

3. The Circuit Court erred in not perpetuating the injunction, so far as Moss, the appellant, was concerned, because there had been several levies of the execution against Shipton on his property by the constable, William H. Hensley, one of the defendants to the appellant's bill; and when property sufficient to satisfy an execution is levied on, it is a satisfaction of the judgment. 3 Mo. R., (republication) *Blair vs. Caldwell*, p. 249 and 250; 12 Johns., 207; 1 Sal., p. 323; 2 Tidd, p. 936; 2 Bacon, p. 72. And as Moss, the appellant, was but the security of Shipton, and those executions alone against Shipton, and his property levied upon, this rule applies with full force in this case, and forever exempts Moss, the appellant.

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*Moss vs. Craft, et al.*


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4. The Circuit Court erred in not perpetuating the injunction, so far as Moss, the appellant, was concerned, because of said Craft and Hensley's neglect to make the judgment and costs out of the property of said Shipton, and said Hensley failing to return said execution, and thereby rendering himself and his securities in his official bond liable, if any one is, to said Craft, the appellee.

*COLE, for Appellee.*

The first point made by Moss is, that he had no notice of the suit before the justice.

This fact is disproved by the docket of the justice and the return of the constable. But were it otherwise, his remedy was at law, not in equity. A person who asks equity must do equity.—Tho's Moss owed the debt; this is not denied; and he should have shown himself ready and willing to pay, which is not the case. Again, the granting of the injunction in this case was a release of all errors in the suit at law. Stat. of Mo., 580, sec. 10, Choteau vs. Douchouquette; 1 Mo. R., 715.

As to the second point, a fraudulent combination to defraud and cheat Moss, it is wholly unsupported by evidence, and flatly denied by the answer of Josiah Craft, adm'r. It is true that the executions were levied perhaps more than once, and the property levied upon was suffered to remain by the constable with Shipton or Moss, and not sold for want of bidders, yet such levy did not discharge Moss and Shipton, nor either of them, from the debt. The property remaining in their custody, and not in the custody of the law, could not extinguish their liability, and turn Craft over to the constable as his only remedy. This would be as little consistent with law as justice. Upon the whole, Moss's complaint appears to have little merit, and according to my limited understanding of the case, the judgment of the Circuit Court is right and ought to be affirmed.

*McBRIDE, J., delivered the opinion of the Court.*

Thomas Moss filed in the Jefferson Circuit Court his bill in chancery making Craft and Hensley defendants, and praying an injunction to restrain the collection of a judgment obtained before a justice of the peace in favor of Craft against him. The bill charges that at a sale of the effects of Jesse Watkins, deceased, by Josiah Craft, as administrator of said estate, one Jesse Shipton purchased property to the amount of \$41 33, for which he executed his note, payable twelve months after the date thereof, with the complainant, Moss, as his security. That after the falling due of the note, Craft commenced suit to recover the amount due before a justice of the peace in said county. That judgment was had against the principal and security by default, and execution was issued on said judgment against the principal alone. That the execution was placed in the hands of the then constable of the township in which the defendant, Shipton, resided, who levied the same on Shipton's property; but did not sell the same for the want of bidders. That after several renewals of the execution and failures to sell the property levied upon, which was ample to pay the debt, Shipton removed to St. Louis



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county, taking the property with him, and there died insolvent. After the removal of Shipton, the plaintiff, Craft, caused an execution to issue on the judgment of the justice against the complainant, Moss, and the same having come into the hands of Hensley, the present constable, he levied the same upon the property of the complainant.

The bill further charges an omission on the part of the first constable to make the money out of Shipton, when the same might readily have been made. That as the constable had made himself liable to Craft, that therefore he, the complainant, is released from his liability on said judgment. That the judgment was obtained against him, Moss, without any service of process or any notice whatever, and is therefore irregular and void as against him. That there was a fraudulent combination between the plaintiff, the defendant, Shipton, and the constable, to wrong and to injure the complainant.

The court granted the injunction prayed for. The defendant, Hensley, failed to answer the bill, and a decree *nisi* was made against him.—The defendant, Craft, answers, admitting the fact that he obtained a judgment before a justice of the peace against the complainant and Jesse Shipton, as charged in the bill; that several executions were issued on said judgment, and property of Shipton was levied upon sufficient to pay the debt, provided it would have sold, but that the same was not sold for the want of buyers, and was permitted by the constable to remain in the possession of the defendant. That the defendant, Shipton, removed to St. Louis, without having paid any part of the judgment, and then he ordered execution against the complainant. That the complainant had notice of the institution of the suit, and that the judgment was legal and regular; denies that he combined or confederated with any one, but asserts that he used all legal and proper means within his power to make his debt out of the defendant, Shipton, prior to his removal out of the jurisdiction of the justice of the peace.

Upon the hearing, the complainant offered evidence going to prove that Shipton lived in Hillsboro', in the county of Jefferson, in the years 1842-3; that Craft came to Hillsboro' at the request of Hensley, the constable, to attend the sale of Shipton's property, but found no advertisements nor constable; that Shipton had some town lots in Hillsboro', a wagon and two or three horses, some cattle, and household and kitchen furniture. That Shipton, about one year after the proposed sale, moved to St. Louis, having sold his house and lot, wagon and horses, prior to his removal; that he is now dead, and his estate insolvent. Hensley, the constable, is living in Jefferson county, has property, and is a good liver.

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*Moss vs. Craft, et al.*

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The note sued on was given for a horse purchased by Shipton at the administrator's sale, and Moss was his security. The complainant also introduced in evidence a copy of the judgment rendered by the justice, as also a transcript showing the date of the several executions, their levies, &c. The return of the constable on the original summons, which was issued by the justice of the peace in favor of Craft against Shipton and Moss, is in the following words: "Executed the within by reading, on the 18th day of July, 1842, and acknowledged the service;" signed H. G. Brown.

The defendant offered no evidence. The court dissolved the injunction, and dismissed the bill; whereupon the complainant appealed to this Court.

It is assigned for error that the court did not perpetuate the injunction because of the insufficiency of the constable's return on the summons, and reference is made to the case of *Charless vs. Marney*, 1 Mo. Rep., 382-3, which we think has no analogy to the case under consideration. In that case, the sufficiency of the constable's return was a question directly at issue and before the court having a revisory power. Not so in the case now before us, for no such relation exists between a justice's court and a court of chancery; besides, the filing of a bill operates a release of all errors at law, and puts the party asking the aid of a court of chancery upon the equity of his case.

It is next contended, that inasmuch as the constable has laid himself liable to Craft for failing to make the debt out of the property of Shipton, upon which he had levied the execution, therefore Moss is discharged. If the constable be liable to Craft in consequence of his neglect of duty, as charged in the bill, no reason can be perceived why he may not be held accountable to Moss, provided he is compelled to pay the debt of Shipton in consequence of the improper conduct of the constable. It does not necessarily result that when the constable, by his misfeasance in office, renders himself liable to a plaintiff in an execution, that therefore the defendant is discharged. He may waive a remedy more difficult, and pursue another more easy of accomplishment. It is next urged, that a levy having been made by the constable upon the property of Shipton sufficient to satisfy the debt, therefore the judgment is satisfied and Moss discharged. This point might possess some weight in an action by Craft against the constable, but we think is entitled to but little consideration when the return of the officer, upon which the levy is established, shows that the property was not sold for the want of bidders. Thus, the presumption of satisfaction which the law raises, is repelled by the fact that the property was not sold.

*State of Missouri, use of Adams and others vs. Campbell, Dudley, et al.*

Wherefore, we are of opinion that the Circuit Court did not err in dissolving the injunction and dismissing the bill; and the other members of the Court concurring in affirming the decree, the same is affirmed.

STATE OF MISSOURI, USE OF ADAMS AND OTHERS, VS. CAMPBELL, DUDLEY ET AL.

1. If a declaration contain but one count, in which several breaches are assigned, a general demurrer cannot be sustained if there be one good breach.
2. Suit may be brought on the bond of an administrator, in the name of the State by any person injured.
3. An heir or distributee may sue for a failure to account for money received, and their right of action accrues as soon as the failure occurs.
4. Where there is a primary, and an ancillary administration of an estate, if the tribunals having jurisdiction of the ancillary administration, can distribute or remit the assets, the courts having jurisdiction of the primary administration will not interfere within the limits of the ancillary administration.

### ERROR to Pike Circuit Court.

BUCKNER, *for Plaintiff in error, insists:*

That the Circuit Court erred in sustaining the demurrer to the declaration.

1. Because the declaration is substantially good; and if *technically* defective, could only be reached by a special demurrer.

2. The 4th, 5th and 6th breaches are well assigned. After a payment of debts by a foreign administrator, the balance in his hands, is subject to distribution according to the laws of the place of the intestate's residence, at the time of his death, and ought to be transmitted to the domestic administrator, for that purpose. Story's Con., § 513, 514, 518; Davis vs. Head, 3 Pick., 128.—Bland was administrator in both jurisdictions, and having a balance in his hands, after payment of debts due in Kentucky, it was his duty to bring this balance into the home administration, to be disposed of according to our laws; and for this neglect, he and his securities on his bond here are liable.

3. But if the breaches are not well assigned, (viz: 4, 5 and 6,) the 1st, 2nd and 3rd are good and sufficient; and the court erred in sustaining the demurrer to the whole declaration. State, use of Darland vs. Porter and other, 9 Mo. R., 356; Rev. Stat. 1835, sec. 16, art. 3; Practice at Law.

4. The suit is brought by the proper parties. Rev. Stat. p. 62.

*State of Missouri, use of Adams and others vs. Campbell, Dudley, et al.*

**WELLS & PORTER, for Defendant in error, insist:**

1. That the plaintiff's declaration is substantially defective in all its breaches, in this, that it does not state, either that Bland's administration in Missouri, on the estate of Adams, had ever been finally settled and distribution of the residuum, after payment of debts ordered, or that the three years from the grant of letters had elapsed and the debts of Adams been paid or discharged, and consequently, it does not appear, that the persons to whose use the suit is brought, are in a situation to be "injured" by the omissions or misfeasances of Bland in his administration. Vide sec. 8, of art. 7, Rev. Statutes; also sec. 3, art. 6, title Administration.

2. If the moneys charged to have been received by Bland, and not accounted for, are permitted to be recovered by the distributees of Adams' estate, instead of by an administrator *de bonis non*, the rights of Adams' creditors may be impaired thereby, for ought that appears in the declaration; and they cite the case of *The State to the use of Ingram vs. Rankin and others*, 4 vol. Mo. Rep., p. 427; also *Croslin, et al. vs. Baker*, 8 vol. Mo. Rep.; the latter case to show that the legal right to personal assets, is in the administrator, where administration has been granted.

3. The 4th, 5th and 6th breaches, seeking to hold the defendants liable for the proceeds of property, received by Bland, by virtue of administration granted to him in Kentucky, are clearly defective in this, that the securities for the administration granted to Bland in Missouri, are not *primarily* liable for assets or funds of Adams' estate, received by virtue of an administration in Kentucky; and the said securities are *only* liable, after the court in Kentucky, having jurisdiction of the administration there, (administration having been settled or debts paid,) shall have ordered the said assets or funds, received in Kentucky, to be remitted to Missouri for distribution. In support of which position, they rely upon Story's *Conflict of Laws*, secs. 512, 513, 514, and 515, also secs. 517 and 518, second edition of same work. And it is not averred in said declaration, that any such order was made, or said funds so remitted.

4. The fact of Bland having been appointed to administer on the estate in Kentucky, as well as that in Missouri, does not make his Missouri securities any more liable than they would have been if some one else had administered on Adams' estate in Kentucky; and they cite Story's *Conflict*, secs. 520 and 521.

5. The 7th breach is *further* defective, in *not* specifying whether the sum of money therein charged to have been received by Bland, was received by him, by virtue of his administration in Kentucky, or his administration in Missouri.

**SCOTT, J., delivered the opinion of the Court.**

This was an action of debt on an administrator's bond, instituted at the instance of Nancy Adams, guardian of the infant children of Daniel Adams, and for her and their use. The defendants were the sureties of Thomas Bland, the administrator of D. Adams. There was but one count in the declaration, containing seven breaches of the condition of the bond. The first three breaches alleged in substance, that the administrator Bland had received several sums of money, for which he had failed to account. The remaining breaches allege substantially, that Bland the administrator in this State, took out letters of administration on the estate of Adams, in the State of Kentucky, and as such he had received large sums of money, for which he failed to account. One of these last counts states moreover, that the moneys received by the ad-

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*State of Missouri, use of Adams and others vs. Campbell, Dudley, et al.*

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ministrator in Kentucky, are subject to distribution among the heirs of D. Adams, the intestate.

There was a general demurrer to the declaration, which was sustained, and the plaintiff sued out this writ of error.

There being but one count in the declaration, alleging several breaches of the condition of the bond, if any one of these breaches is sufficient, the demurrer must be overruled. The 18th section of the 3rd article of the act concerning practice at law, does not affect this case. By the common law, if a declaration contained several counts, one of which was good, and the others faulty, if a general demurrer was put in to the whole declaration, the demurrer must have been overruled; for the good count being sufficient to sustain the plaintiff's right to a recovery, it could not be said, that the declaration was insufficient in law. The section above referred to, was introduced to remedy this, by making it operate as though it was put in only to the bad counts, sustaining it as to those which were bad, and overruling it as to the good ones. Here then is but one count in the declaration, and numerous breaches of the condition of the bond assigned in it; now it is evident, that if there was one good breach assigned, that the plaintiff is entitled to recover, if it is sustained by proof. There being but one count in the declaration, the section above referred to, does not apply; that was only intended when there were two or more counts, some of which were bad. It has been formerly suggested by this Court, that in cases like the present, the proper practice was, on the trial to move to exclude all evidence under the faulty breaches. *Williams vs. Madden*, 9 Wend., 240.

There is no foundation for the assumption, that this suit should have been brought by an administrator *de bonis non*, of Daniel Adams. The suit could only have been brought as it was, in the name of the State of Missouri, the bond being made payable to her; and whether it could have been brought for the use of the heirs and distributees, would depend upon the nature of the breach of the condition, assigned in the declaration. The statute gives an action on the bond, "at the instance of any party injured, for any breach of its conditions." So the question is not in whose name the suit should be brought, but whether those for whom it is instituted, have shown that they are injured, by any of the breaches set forth in the declaration.

Certainly the interests of all those who are in any way concerned in the estate of deceased persons, require that such estate should be brought to a final settlement, with as little delay as possible. It is obvious, that heirs and distributees may be injured by the delay, neglect, or refusal of



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administrators to account for moneys received. Whether the estate will be insolvent or not, is not generally ascertained until there is an account. A want of knowledge of the condition of their deceased parent's estate, may distract the views of his children, and prevent them from adopting that course of life, which its situation may ultimately require. Whether three years have elapsed from the date of the letters, is a matter of utter indifference. Lands may descend; there is a contingent right in the administrator to sell those lands. The existence of this right may seriously affect their sale by the heir. Suits on administration bonds, can only be brought against the securities, within seven years from the death of the principal. If administrators *de bonis non* and creditors fail to bring suit, must those rights which are postponed to theirs, be sacrificed by their neglect? These considerations are sufficient to show, that heirs and distributees may be injured by the failure of an administrator to account for moneys received by him. The law therefore notices, that heirs and distributees may be injured by the neglect of an administrator to account for money received. This injury accrues as soon as the neglect occurred, whether it is within three years or not. The amount of the injury, is a question for the jury, to be determined by the facts in evidence before them. If the heirs and distributees should recover from an administrator, moneys or property, not accounted for, if creditors should afterwards appear, they could by bill in equity compel them to refund.

The breaches in relation to the administration in Kentucky, are insufficient. It has been held, that when there is a primary and ancillary administration, that a court of equity has jurisdiction to decree an account and distribution according to the *lex domicilii* of the estate of a deceased person, domiciliated abroad, which has been collected under that administration. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case. *Harvey vs. Richards*, 1 Mason, 381. This principle has been incorporated into our Code, and is declaratory of what seems to have been the law on the subject. Sections 21-2-3-4-5 and 26 of the 6th art. of the act concerning administration. *Story's Conflict*, secs. 414, 414 and 415. If the tribunals within the jurisdiction of an ancillary administration, can distribute or remit the assets found there, as circumstances may require, it will follow, that the courts of the primary administration, cannot interfere with the assets, within the limits of the ancillary administration.

The other Judges concurring, the judgment will be reversed and the cause remanded.

*Brant vs. Higgins.*

BRANT vs. HIGGINS.

1. In an action for a malicious arrest, the verdict of a jury in the case in which the arrest was made, though competent evidence for plaintiff to shew the want of probable cause, yet it is not of equal weight with a discharge by the examining magistrate in a criminal case, nor to the refusal of a grand jury to find an indictment. The weight to be given to the verdict as evidence, must depend upon the circumstances attending its rendition.
2. Although the want of probable cause is a question of law, the jury must decide upon the evidence of the facts which establish such want.

APPEAL to St. Charles Circuit Court.

*GANTT, for Appellant, insists:*

1. The seventh instruction asked by plaintiff, and given by the Circuit Court, was erroneous.—It confounds the verdict of a jury in a civil case with the refusal of a committing magistrate to hold an accused person to bail, and further directs the jury to infer, not only absence of probable cause, but the existence of corrupt motives in the appellant.

2. The ninth instruction asked for by the plaintiff below, and given by the court, was erroneous. It could not but mislead the jury, to be told that Brant could have permitted Higgins to go to his child's funeral in custody of the sheriff, without impairing his rights. If the arrest is to be governed by the rules of final process, it was not true at all that Brant could assent to Higgins' discharge, without prejudice. If it is to be governed by the rules regulating mesne process, Brant could not have *permitted*, &c., for he had no power to *forbid*. It is error to accompany a correct refusal of an instruction with remarks which may mislead a jury. *Beehler vs. Coonce*, 8 Mo. R., 247. How much more then to give an instruction which cannot fail to have that effect.

*TODD, for Appellee, insists:*

1. Instructions Nos. 1, 2, 5, 6 and 7, on behalf of Higgins, and Nos. 1, 2, 3 and 4, in behalf of Brant, present the law as fully and as favorably for Brant as the authorities warrant. 2 B. & C., p. 693; 9 Eng. Com. Law Reps., p. 225; 2 B. & A., p. 179; 22 Eng. C. L. R., p. 53; 5 Taunt., p. 277; Starkie on Evidence, p. 489; 8 Mo. R., p. 339; 12 Pick., 324; 3 Mason's Rep., 105. As to kind of malice, 2 Saunders on Evidence and Pleading, p. 659; 3 Mason's Reps., p. 104. Although a party has cause of action, yet he may be liable in this action by abuse of remedies, and oppression, as by excessive bail. 4 Serg. & Rawle, 23; 9 Ohio R., 105; 2 Tuck. Com., p. 63; 2 Wilson, p. 305, per Lord Camden. Acquittal, evidence of want of probable cause; and slight additional evidence only needed on the part of the plaintiff. 6 Bing., 183, or (19 Eng. C. L. R., p. 47, 50;) 8 Mo. R., 339. And a party is less favored in a civil than in a criminal prosecution. 2 Saun. on Evidence and Pleading; 24 Pick., 81, 86. Malice may be inferred from want of probable cause. 5 Taunt., 583; 1 T. R., p. 544 and 545; 9 East., 351; 12 Pick., 81, 87; 3 Mason, 102; 6 Bing., 183; (19 Eng. C. L. R., 47, 50) 1 Stewart, 19; 2 Tuck. Com., p. 64.

2. Instruction No. 4, as to action of detinue, was rightly given. 3 Black. Com., p. 151; 1 Chit. Pl., 138, 139; 2 Dana's R., 332; 2 Tucker's Com., p. 80.

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*Brant vs. Higgins.*


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3. Instruction No. 10, as to action of replevin, was rightly given. Rev. Code of Mo. 1835, p. 527, sec. 1.

4. Instruction No. 9, as to letting Higgins attend the funeral of his child, in the custody of the sheriff, was rightly given. 3 Black. Com., p. 290, 415; 2 Saund. R., p. 61, a n. 4; 5 J. R. Rep., 182; 10 J. R. Rep., 420; 2 Rawle, 284.

5. The amount of damages is not excessive, and is no cause for a new trial. 2 Dunlap's Prac., p. 680; 2 Tidd, p. 940; 9 J. R., 45; 10 J. R., 443; 2 Pick., 113, 119; 7 do., 82, 85; 16 do., 541, 547.

6. The remark of one of the jurors was no cause for a new trial. Besides, no exception was taken to their retiring again, after it was made. 5 Mo. R., 525; 14 Pick., 236; 5 Blaney, 340; 4 Wash. C. C. Reps., 32; 2 Black., 114; 4 H. & M., 1, 18, 19, 20, 21 and 22; 1 Cow., 221, 243; 3 do. 355; 5 Taunt., 277.

7. The court properly refused instruction No. 6, of appellant, because not applicable to the evidence.

NAPTON, J., *delivered the opinion of the Court.*

This was an action for a malicious arrest, brought by Amando Higgins against the appellant, Brant. The suit was commenced in 1844, in St. Louis county, but in consequence of the fact that the Judges of the Court of Common Pleas and Circuit Court had been of counsel for the parties, it was removed to St. Charles, and tried there. The plaintiff got a verdict for \$4000, and a judgment thereon.

It will be necessary, to an understanding of the points of law on which this case turns, to give a somewhat detailed statement of the testimony.

The plaintiff introduced a record of a suit in detinue, from which it appeared that Brant, on the 27th October, 1842, filed a declaration in detinue against Higgins, alleging the detention of goods specifically enumerated to the value of \$3000. This declaration was accompanied by an affidavit on the part of Brant that the property described in the declaration belonged to him, and that it was worth at least fifteen hundred dollars, and that Higgins unlawfully detained the property from him.— A *capias* issued, and Higgins was arrested on the 27th October, 1842, and finally gave bail in the sum of \$3000, on the 4th of November, 1842. The cause was prosecuted until February, 1844, when a jury was summoned, and the plaintiff took a nonsuit. The bill of exceptions taken in this suit of detinue gives the following statement of the occurrences at the trial. The plaintiff (Brant) produced a mortgage from Van Hollis Higgins to himself, which, in consideration of \$500 advanced by Brant to the said Van Hollis, conveyed to him, Brant; all the goods, wares and merchandize then in the store occupied by him, the said Van Hollis, and particularly enumerated in a schedule annexed to the deed.

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It was expressly stated in the deed, that Van Hollis H. was to retain possession and carry on his trade as usual, but that if any other creditor attached, Brant was to take possession. It further appeared from the bill of exceptions, that the plaintiff was compelled to take a nonsuit, because of his inability to prove the execution of this mortgage by a subscribing witness. This nonsuit was subsequently set aside, and the cause was removed to St. Charles county, where a trial was had, and a verdict rendered for the defendant. No bill of exceptions was taken on this second trial.

*J. M. Krum*, who had been counsel for Higgins, testified, that he became acquainted with Higgins in the summer of 1842; that in October of that year, he was sent for by Higgins, who was then in jail. He examined the papers in the action of detinue, and explained the character of the action to Higgins, and told him he could get his release by giving bail. Higgins stated that he was a stranger, just set up in business, and it would be difficult to procure bail, and enquired if there was no other way. Witness suggested a *habeas corpus*, grounded on a supposed defect of the affidavit, and accordingly a *habeas corpus* was sued out, but proved unsuccessful. The Judge of the Circuit Court was absent, and therefore no attempt was made to reduce the amount of bail required.—Witness applied to several persons on behalf of Higgins, but was not successful. After witness had been in jail several days, his child was taken dangerously ill, and for this cause, his exertions were renewed to get bail. Mrs. Higgins had not been informed of his arrest at first; they had not been married long. The child growing worse, propositions for a compromise were made by Higgins. All the parties met at the office of Blair & Gantt; the terms of the compromise were understood to be acceded to, when a paper was handed to witness by Brant's counsel, which purported to be a release from Higgins to Brant of all damages on account of the suit in detinue. The effect of this paper was explained to Higgins by the witness, and Higgins refused to sign the paper.—Brant insisted, and the whole matter of compromise failed, and Higgins was remanded to jail. The same evening, or the next morning, witness heard of the death of Higgins' child, and communicated the event to Higgins, who was greatly affected, and directed witness to pledge all his property in order to procure bail. This resulted in bail being procured on the 3rd November; 1842, some four or five days after the death of his child. Higgins then was released and attended the funeral of his child. He immediately left St. Louis, and has not since resided in this State.

*Sharp*, another witness for plaintiff, testified that he was the clerk in

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the store of Van Hollis Higgins before the sale to Amando Higgins, (plaintiff;) that Beach's attachment was levied on about \$3000 worth of goods, then in possession of plaintiff; that plaintiff paid the rent of the store to Brant, after the sale from Van Hollis to plaintiff. After the attachment of Beach, the plaintiff continued to do business on the stock remaining, which was worth perhaps \$1200. After the trial upon the interpleader of plaintiff, which terminated favorably to the plaintiff, the goods were returned, and witness was in the act of taking them out of the boxes, when Brant, who lived on the same square, called at the store and claimed the goods as his. High words passed between plaintiff and defendant, and defendant left the store. Witness then, at the request of Higgins, procured a copy of Brant's mortgage, and, in conjunction with a son of Brant, compared the goods in the schedule with those in the store, and found no goods in the store corresponding with those in the schedule, and informed defendant of this. The defendant replied that he claimed all the goods in the store, by virtue of the mortgage; that if they were not the same, they were purchased with the proceeds of the sales of the mortgaged goods. Witness came into the store of Van Hollis H. in February, 1842. About fifteen hundred dollars worth of goods were purchased on credit by Van Hollis of Beach and others, and added to the stock. Witness knew that plaintiff had furnished his brother, Van Hollis, with about fifteen hundred dollars worth of goods, in the fall of 1841. After the death of plaintiff's child, witness made application to defendant, on the part of plaintiff, for permission to plaintiff to attend the funeral in custody of the sheriff. Brant gave witness a note to his counsel, who replied in writing. When this reply of counsel was carried by witness to Brant, the latter, after reading it, declined giving the desired permission. In the assignment made by Van Hollis to his brother, no provision was made for any of his other creditors.

*Russell Higgins*, a brother of Van Hollis and Amando, testified in relation to the debts due by Van Hollis to his brother, the plaintiff, and also in relation to his unsuccessful attempt to procure bail. He stated that one individual to whom he applied, (Coleman) told him he had received an anonymous note warning him to keep clear of the affair, as it was a swindling concern.

*Coleman* stated that he had received a note, which he had lost or mislaid, purporting to give Brant's side of the case, and warning him not to go bail for Higgins, as it was a swindling concern. He had no knowledge of the hand-writing. He was with Brant a day or two after he had received the note, and upon a conversation arising about the Higgins,



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he, Brant, told him it was well enough he had declined, as he would probably have lost by it.

*Montgomery Blair* testified on behalf of the defendant, that he was counsel for him, and advised him to institute the action of detinue, upon the facts disclosed to him, which were the deed of trust, the note, and the attachment of Beach. Witness was of opinion that the sale from Van Hellis to Amando was fraudulent, and did not know that Van Hellis was under age when this deed was made. This information he received from plaintiff, but he did not credit it.

*T. T. Gantt* was also of counsel for Brant, and stated the particulars of the consultation between Brant and his counsel, and that they advised the action of detinue, notwithstanding that Brant suggested and seemed to prefer *replevin*.

The court gave the following instructions to the jury, at plaintiff's instance :

1. The defendant, in order to shield himself on the ground that in bringing said suit in detinue, he acted in good faith upon the advice of counsel, he must show in evidence that, before the suit, he fully and fairly stated to his counsel all the facts and circumstances material for counsel to know to enable them to form an honest and a sound opinion upon the case. Therefore, unless the jury believe from the evidence that the defendant, before said suit, did so state his case to his counsel, they cannot find that he acted in good faith upon the advice of counsel.

2. And even if a person does prove that he did fully and fairly state his case to his counsel, and then proceeded by his advice thereon, this ought not to avail, if the jury believe from his conduct throughout that he did not act in good faith.

3. If the jury find for the plaintiff, he will be entitled to recover such damages as the jury shall believe from the evidence he suffered by reason of the suit in detinue; and in addition thereto, the jury may add such further amount, by way of smart money, as they may think, from all the circumstances, the defendant should be punished with.

4. The action of detinue will lie only for particular and specific personal chattels, which are capable of being pointed out and identified, so that the claimant can show them, and the person charged with detaining them can, on demand therefor, deliver them.

5. If the jury believe from the evidence that the arrest of the plaintiff by the defendant in his suit in detinue given in evidence was without probable cause, and malicious, they ought to find for the plaintiff.

6. There are two kinds of malice, malice in fact and malice in law; the

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former, in common acceptation, means ill will against a person, the latter a wrongful act done intentionally. If, therefore, the jury believe from the evidence that the defendant in said suit in detinue was moved thereto by ill will against the plaintiff, or that said suit was wrongful and intentionally brought, they ought to find that the arrest in said suit was malicious.

7. The verdict for the plaintiff in said suit in detinue is evidence that said suit was wrongful and without probable cause, and but slight additional evidence thereto is required to prove it.

8. It is lawful for a failing debtor to prefer one creditor to all others, although it takes all his means.

9. Brant could have permitted Higgins to have attended the funeral of his child, in the custody of the sheriff, without, by that act, causing any prejudice to his rights in his action of detinue.

10. If Brant was entitled to take possession of the goods mentioned in his suit in detinue by reason of the attachment of Beach, he could have sued in replevin.

11. If the jury believe from the evidence that said suit in detinue was without probable cause, they may infer therefrom that it was malicious.

The court also gave the following at the instance of defendant:

1. The jury are instructed as follows: Two things must concur to render a defendant liable in an action for malicious arrest; 1st, there must be malice on the part of the defendant; 2nd, there must be want of probable cause. One of these ingredients is not sufficient, unless the other be present also.

2. If the jury believe from the evidence that the defendant had probable cause for commencing the action of detinue against A. D. Higgins, they must find for the defendant.

3. If they find from the evidence that the defendant, before commencing proceedings against the said A. D. Higgins in detinue, took the advice of counsel upon a full and fair statement of his case, and acted in good faith pursuant to the advice given to him by said counsel, they must find the defendant not guilty.

4. If they believe from the evidence that the said Brant acted mistakenly, but without an intent to oppress the said Higgins by the abuse of legal process, they must find for the defendant.

5. There is nothing in the nature of the action of *detinue* which is inconsistent with its being brought to recover such articles as are enumerated in the declaration in detinue in the case of J. B. Brant vs. A. D. Higgins.

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The court refused to give the following, which the defendant asked:

6. In the case of Joshua B. Brant against Amando D. Higgins, if the plaintiff, Brant, had *consented* that the defendant should go out of the custody of the sheriff, it would have been a voluntary escape, and the defendant could not be retaken.

The only errors insisted on are the seventh and ninth instructions.

The seventh instruction is "that the verdict for the plaintiff in said action of detinue is evidence that said suit was wrongful and without probable cause, and but slight additional evidence thereto is required to prove it." This instruction seems to have resulted from confounding the action for a malicious arrest with the action for a malicious prosecution. The verdict of a jury, upon the trial of a civil action, is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in a criminal proceeding, the final acquittal of the accused can have but little weight as evidence of probable cause, compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and the grand jury have the very question of probable cause to try; the evidence on the side of the prosecution is alone examined, and the proceeding is entirely *ex parte*. Under such circumstances, the refusal of the examining tribunal to hold the accused over to trial, must necessarily be very persuasive evidence that the prosecution is groundless. But this would not be the case with a verdict of acquittal, after a full investigation of the case, and an examination of the testimony on both sides; much less would it be so in a civil proceeding. It would be hard if every suitor who fails to recover, whether upon technical grounds or on the merits, should, for such failure, be presumed to have instituted a groundless action. The result of the action may depend upon facts and contingencies which no skill or foresight, however honest and persevering, could anticipate or prevent. The verdict for the defendant is competent evidence, but its weight must necessarily depend upon the circumstances attending the trial, and the manner in which it is rendered. Thus, if a jury should render their verdict from the jury box, without deliberation, this would be a circumstance to give weight to that verdict, as evidence of the want of probable cause. The remarks of this Court in the case of *Williams vs. Van Meter*, (8 Mo. R., 342) must be understood in connexion with the facts upon which they were based. That was an action for a malicious prosecution, and the plaintiff had been discharged by the committing magistrate. Although that discharge was not regarded as sufficient *of itself* to establish the want of probable cause, yet it was con-

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sidered as evidence of such a character as to require but slight additional evidence to make out the plaintiff's case. But these observations of the Court in that case would be very inapplicable to a verdict by a petit jury in a civil case. *Wengart vs. Benshore*, 1 Penn. R., 232; *Sterling vs. Adams*, 3 Day R., 411; *Ray vs. Law*, 1 Peter's C. C. R., 206. Besides, the remarks of this Court in the case just alluded to, were evidently not designed to indicate a rule of evidence for the guidance of a jury.

It is the province of the jury to decide upon the weight of evidence and the credibility of the witnesses. For this reason alone, the seventh instruction is erroneous.

It is however suggested, that this error should form no obstacle to an affirmance of this judgment, because the question of probable cause is a legal one, and the proof on the record shows a want of probable cause. It is true, that what constitutes probable cause has been determined to be a legal question, but the jury have still a right to pass upon the facts. Where the facts are controverted, or the credibility of the witnesses is to be determined, the evidence must go to the jury. *Martin vs. Deys*, 2 Wend., 424; *Gorton vs. De Angelis*, 6 Wend., 418; *Burlingame vs. Burlingame*, 8 Cow., 142; *French vs. Smith*, 4 Ver. R., 363. And this was the course of the Circuit Court in most of the instructions given in this case. Hence, the jury were told that the action of detinue could be maintained only for specific chattels; and there was evidence to show that the goods in possession of Amando Higgins were not the same goods which had been mortgaged by Van Hollis Higgins to Brant; but the weight and credibility of this testimony was left to the jury. We cannot undertake to conjecture on what point the case turned with the jury, nor what influence the seventh instruction may have exercised upon them.—The instruction was upon a material point in the case, and though it would seem to have been superfluous, it may not have been harmless.

To the ninth instruction, we perceive no substantial objections. It is abstractly correct, and the principal objection to it is, that it left in the power of the jury an inference that Brant's consent was *necessary* to authorize the sheriff to accompany Higgins to attend the obsequies of his child. Such is not a necessary inference from the instruction, and if it were, the counsel could have had the additional explanation given. The counter instruction asked was not law, and if it were, it was inapplicable to the testimony.

We shall remand the case for a new trial. The other judges concurring, the judgment is reversed.

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MARY TOLSON ET AL. VS. DANIEL TOLSON ET AL.

1. On a bill for the specific performance of a contract for the sale of land, it is competent for the defendant to prove a parole discharge or waiver of performance.
2. Where A, the father, had purchased a tract of land of B the son, had paid the purchase money, and taken possession of and improved the land; on a bill filed by a portion of the heirs of A, to compel the heirs of B to make a title, evidence that B had repeatedly declared to his father that he was ready to make a deed; that the father lived 22 years after the purchase, during all which time up to B's death, 14 years after the sale, he refused to accept a deed—after B's death, instituted no proceedings to get a title—but on all occasions declared that he intended that B or B's children should have the land—that B was the youngest and favorite son, and that he died at an early age, leaving a large family—that the father was possessed of a good property,—is sufficient to shew a discharge of the performance of the contract.

APPEAL from Howard Circuit Court.

LEONARD, *for Appellants, insists:*

1. Mrs. Howard and John Tolson, who after the death of their father William Tolson, conveyed their interest in the land, to the complainants are necessary parties to the bill, and for want of these parties the decree must be reversed. Mitford's Chan. Plead., 68, 220; Hickock vs. Scribner, 3 Johnson cases, 317; Fresh vs. Million, 9 Mo. Rep., 320, 321.

2. The decree is erroneous in declaring that the land at the time of William Tolson's death, belonged in common to the complainants and the children of Thomas Tolson, when according to the facts stated in the bill, Mrs. Howard and John Tolson were also tenants in common with them in the ownership. The decree is still further erroneous in directing the children of Thomas Tolson to convey to the complainants all the title to the land, that was in their father at his death, thus divesting them of their admitted shares in the land, as heirs and devisees of their grandfather William Tolson.

3. A parole waiver or abandonment even of a written contract for the purchase of land, is a bar to a specific performance. Here the conduct and declarations of William Tolson—the relation in which he stood to Thomas Tolson, and the situation of his son's family, all demonstrate that he intended the land after his own death, for his son and family, as a provision for them, and long before his death, had abandoned all claim to the specific execution that is now sought for by a portion of his heirs at law. Gowman vs. Salsbury, 1 Vern., 240; Stevens vs. Cooper, 1 John. C. Rep., 430; Botsford vs. Burr, 2 John. C. Rep., 416; Wentz vs. Dehaven, ex'r. of Dehaven, 1 Searg. & Rawl., 316; 2 Story's Equity, 1st Ed. chap. 18, sec. 770.

CLARK, *for Appellee, insists:*

1. The important question in this case is, whether under all the facts presented in the record, a specific execution of this contract can be enforced against the plea of the statute of frauds which is insisted on by the defendants. It is a rule of equity established by the English and most of the American authorities, that parole agreements for land as well as other things, may be enforced if



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the agreement has been in part performed, provided such agreement is admitted or satisfactorily proven. The evidence in this case clearly proves the agreement as charged in the bill, the payment of the purchase money, taking possession of the land, and making improvements thereon under the purchase and agreement; done too with the knowledge and by the consent of the grantor, are deemed sufficient acts to amount to such a part performance as will take the case out of the statute of frauds. This position is sustained very fully by the following authorities: 2 Story's Equity, 63 to 67; 1 John. Ch. Rep., 131; Phillips vs. Thompson, 14 John. Rep., 15; 4 Blackford Rep., 94; Johnson vs. Glaney and others, and the case of Moreland vs. Semasten, reported in the same book, p. 383. The case in 14 Johnson was an appeal from the Chancellor, and that court in that case reviews all the cases on this subject. So does the court in the cases cited in Blackford. The case of Halsa vs. Halsa decided by this Court, 7 Mo. Rep., 28, is cited as bearing upon this subject.

2. The objection to the reception of parol evidence to establish a parol agreement, and to prove performance under the agreement, cannot be well founded. The person in possession would be a trespasser if no contract existed, and might be proceeded against as a trespasser; to relieve him from which he is always allowed to prove the contract under which he occupies, and being allowed to give such evidence for one purpose, he is allowed to give it for all purposes. 1 Phillips' Evid., 575.

3. It is contended, that the evidence on the record tending to show an abandonment of the contract on the part of the ancestor of the complainants, was addressed to the Chancellor with the other evidence, and was to be weighed by him. It had but little weight with him, doubtless coming from the source it did, and obtained as it was—the chancellor having passed it, this Court will not reverse on that account unless he was clearly and palpably wrong.

4. The decree we think is fully justified by the evidence, and is in legal form.

*NAPTON, J., delivered the opinion of the Court.*

This was a suit in Chancery by the heirs of William Tolson, to procure the legal title to a tract of land in Howard county, and to restrain further proceedings upon an action of ejectment instituted upon such legal title by the heirs of Thomas Tolson, deceased. The facts as stated in the bill, were as follows:

In the year 1819, Samuel Alexander, entered at the land office in Franklin, under the credit system, a quarter section of land, and paid one fourth of the purchase money to the United States. In 1821, Thomas Tolson purchased the said quarter section from Alexander, and afterwards relinquished the east half of said quarter. In 1822, William Tolson, the father of said Thomas, removed from Kentucky to this State, and was about locating in Boone county, but his son Thomas, as an inducement for him to settle in Howard, proposed to let him have this half quarter section of land, at the price he had given, with the interest.—The purchase was made, and William Tolson took possession of the land, in the fall of 1822, and paid up to the United States what was still due on the land, and to Thomas Tolson what had already been advanced to Alexander by said Thomas. William Tolson improved this land and re-

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sided on it until his death in 1844. Thomas Tolson lived with his father until he married, and then settled another farm in the vicinity, where he continued until his death, which took place in 1836. Thomas Tolson left seven children. He never pretended to any title to the land, at any time after the sale to his father, but on the contrary repeatedly offered to make him a deed, which the old man upon some pretext or other, evaded or postponed. The patent for this land had issued in 1825, to Thomas Tolson, assignee of Alexander. In 1829, Wm. Tolson being about to marry a second wife, made his will, leaving all his property, both personal and real to be equally divided among his children. In 1844 he died, and the plaintiffs in this suit are his heirs at law, excepting the children of Thomas Tolson, deceased, who were defendants, and his daughter Mrs. Howard, and his son John Tolson, the two last having sold their interest to the remaining children of William Tolson.

The defendants who were minors answered by their guardians, denying the contract as alleged in the bill, and insisting on the statute of frauds; they moreover relied on an abandonment of all right to a specific execution of the contract on the part of William Tolson, and insisted, that the title had been suffered to remain in Thomas Tolson by his father, with the intent that the land should be a provision for his children.

At the hearing, the evidence on the part of the plaintiffs, established all the material allegations of their bill, beyond all controversy. The defendants however introduced evidence for the purpose of showing, that there was a parol waiver by William Tolson of his right to a legal title and that the legal title was purposely left in Thomas Tolson, with a view to benefit his children. As the case must turn upon this point, we will state the material parts of this testimony. Previous to this it may be as well to state, that the proof introduced by the complainants showed most clearly, that Thomas Tolson (the son) always acknowledged his father's title to this land, and repeatedly proffered to make him a deed.

*N. Todd*, one of the witnesses for complainants, stated that in conversations which he had with the old man in the years 1825, 1826 and 1827, he heard him say, "that the right to the land was not made, that his children would not pay for making a deed; that *Thomas was a good boy*, and all he cared about was his life time in the land."

*Thorp*, a witness for defendants, was present at the death of Thomas Tolson in 1836. A conversation arose in the room of the dying man, about this deed. Thomas expressed his willingness to make one then, but the old man said, "if one was made, the children would pay not the expense—the land was for them any how, he had often told them so, and

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they would not pay a cent, and he did not care a d—n; that he would as soon Polly and the children should have it.”

*Mrs. Thorp* was present on the same occasion, and heard Thomas express his willingness to make a deed. The old man said, “you have always been ready, but my children would not pay one cent—it was for them, and I don’t care a d—n.” Thomas, the son, then asked him to recollect Polly and the children; to which the old man replied, “it (meaning the land) he intended for Polly and the children.” The old man afterwards walked into the kitchen, where the witness and others were sitting, and said there, it was for Polly and her children, he always intended it—his children would not pay a cent, and he did not care a damn.”

*Mrs. Moberly*, another witness was present on the same occasion.—She met Wm. Tolson in the kitchen; and when some of his children went out, he said, “he did not want the right at all—that Tom and Polly always knew him whenever they met him, and that he always intended to do something for Polly and her children.”

*John Moberly* was present on the same occasion, and saw the old man come out of the kitchen smoking a pipe, when he said to witness, “that James Brown had sent for him; that some of the children kept fussing about the right to the land—that he did not want it—he could have had it long ago, but Thomas had been a dutiful boy, and he did not want it.”

*Braxton Brown* testified that he heard a conversation between Thomas Tolson and his father, some months before the death of the former.—Thomas said he was ready to make the deed, to which the old man replied, “that he did not want it—that he had tried to get the boys to pay for it, and they would not, and by G—d he would not—that if they did not want it, he did not.”

*John Snell* had a few words with the old man at the funeral of Thomas Tolson, he said to the witness that, “two of his sons did not know him to-day, and the reason was, that he had not taken a deed from Thomas.—That he cared nothing about it—they would not pay the expense, and he would as soon Tom’s children had it as an body else.”

*R. Brown* was also present when Thomas Tolson was on his death bed. The old man was called in, and Thomas said he was ready to sign the deed, if it was ready. The old man left the room, and on going out touched witness and asked him what he should do. Witness suggested that Gen. Clark lived near and would write the deed. The old man was about starting to Gen. Clark’s, but stopped, and observed, “if he did it, they wouldn’t pay for it, and it might go to hell—that Thomas had always been a dutiful child to him, and so had Polly—that they would not

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get more than their part any how, and it might go."

In the spring following, this witness had another conversation with the old man, when he reminded witness of his promise to Thomas, "that the land was in Thomas' name, but if the witness did not watch, they would cheat him out of it." The old man was drinking when this conversation took place. William Tolson had twenty or thirty slaves, and a quarter section of land besides the one now in controversy, and horses and stock of various kinds, and money at interest to the amount of one thousand dollars, and was out of debt.

The Circuit Court decreed for the complainants, vesting the title to the land in the heirs of William Tolson, and perpetually enjoining the ejectment suit.

Upon the first branch of this case, there seems to be no ground for controversy either as to the law or the facts. The testimony establishes beyond dispute, that William Tolson the father, purchased the tract of land in dispute, from his son Thomas, and paid for it, and took possession of it, and retained the possession until his death—the legal title being suffered to remain in the son. Were these the only facts in the case, it is clear that there would be no obstacle to an enforcement of this contract, notwithstanding the statute of frauds. But the heirs of the son rely on a parol waiver of this contract, and the only controvertible point in the case, is, whether such a parol waiver be admissible, to rebut the equity made out; and if admissible, whether the evidence sufficiently establishes it.

It has been held that a specific execution of even a written agreement may be resisted on the ground of a parol waiver, or a waiver by acts of the parties. *Price vs. Dyer*, 17 Ves., 356; 6 Ves., 336, in note; 4 Ves., 848; *Woolan vs. Hearne*, 7 Ves., 211; *Davis vs. Symonds*, 1 Cox, 407. In what manner a written agreement may be affected by parol testimony, and upon what grounds the courts will proceed in admitting or rejecting such evidence, are the points which have been chiefly discussed in the cases cited. No questions of this character arise here, but the principle of those decisions is so far important as to place beyond dispute the right of the defendant to resist the specific execution of a contract, which has never been reduced to writing, by testimony of equal dignity with that relied on to enforce it.

The circumstances of the present case are singular. Both the parties to the original transaction are dead, and the relation between them, was that of father and son. The title to the land was permitted to remain in the son for 22 years—during fourteen of which the son was living, and

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at all times expressed an entire willingness to make the conveyance.— There is no evidence in the case to show, that this failure to convey, arose from ignorance on the part of the father of his rights, or from any disinclination on the part of the son to acknowledge them. It does not appear to have been the result of accident, or inattention, much less of any trick or contrivance on the part of the son. The old man, it seems, was frequently reminded of the condition of affairs, and of the propriety of getting a deed. His invariable excuse according the statement of the witnesses was, "that the children would not pay the expense, and he did not care a damn." What inference is to be drawn from such language as this, often repeated, and from his whole conduct in relation to the matter? Can it really be credited, that a man in his circumstances, the owner of a well stocked farm, of twenty or thirty slaves, and with money at interest, and out of debt, was unwilling to encounter the expense of a dollar or two in procuring a deed, if he really desired or intended that the deed should be made? Is it not more rational to set this down as a pretext, and to consider it, in connexion with his whole conduct, as indicative of a fixed design to leave the legal title where it was? It is true that the language of William Tolson was somewhat variant and contradictory, sometimes declaring as he did, that the land in dispute was "for Polly and her children," and at other times stating, "that the land belonged to his children *any how*, but that they would not pay the expense of the deed." These contradictory statements may however be accounted for, by supposing that there was an unwillingness on the part of the old man to aver a settled determination, that this land should go to his son Thomas, to the exclusion of his other children. His expressions therefore, are not always consistent, but it is to be observed, that however inconsistent may have been his declarations before different witnesses, his conduct was always the same. The length of time during which this conduct continued, is a circumstance entitled as we think, to great weight, in arriving at his real intentions. This refusal on his part to take any trouble or expense in procuring a deed, was not a circumstance which occurred only once or twice in a short period, but this condition of things was allowed to continue for 22 years, during all which time the deed could have been obtained at any moment, by application to his son, during his life time, or by taking the proper steps after his death. This is a most unaccountable degree of inattention on the part of a man not shown to be imbecile or in any way incompetent to manage his business. We cannot resist the conclusion if the statements of these seven or eight witnesses are to be relied on, that William Tolson did not desire a convey-



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*Ex parte Cox.*

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ance of this land to himself, and that he designed it for the benefit of his son Thomas' children. It appears that Thomas was his youngest and favorite son—that he humored the eccentricities of his father, and that he died at an early age, leaving a wife and seven children. It is inferible from the testimony, that his other children were all previous to his death, married and comfortably settled and provided for. Under these circumstances there is nothing very singular in the father's evincing a disposition to make some additional provision for a family of orphans—the offspring of his youngest and favorite child.

The other Judges concurring, the decree is reversed and the bill dismissed.

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*EX PARTE COX.*

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1. A change of venue cannot be awarded after the issues in a case have been tried and a verdict found.
2. If, in such case, a change of venue be awarded, a *mandamus* will lie from the Supreme Court to compel the Circuit Court granting the change to proceed and determine the cause.

**APPLICATION for a *Mandamus* to Platte Circuit Court.**

NAPTON, J., *delivered the opinion of the Court.*

It appears from the petition of Adeline Cox, and the record accompanying it, that a suit was instituted by Jacob Cox against the petitioner, who was his wife, for a divorce—that bill and answer were filed—issues made up and tried by a jury—and a verdict found. At this stage of the proceedings, Jacob Cox applied for a change of venue, on the ground that the Judge of the Platte Circuit Court was prejudiced against him. The change was ordered, and this application is to compel the said Circuit Court to proceed and determine the cause.

Our statute which authorizes a change of venue in civil cases, does not in terms declare at what period of the cause such orders may be made. There can be no doubt, however, that it never was contemplated that the progress of a suit could be interrupted at any period by such applications. The law must be construed with reference to the practice

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*State of Missouri vs. Ames.*


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of other courts and our courts, so as not to produce inconvenience and absurdity. We need not, in this case, undertake to fix any particular period, beyond which such applications should be disregarded, but we do not hesitate to say that, after the issues have been made up and tried, it is too late for the complainant to come in and swear that the Judge is prejudiced. No special facts are stated to account for this untimely application. If any prejudice existed on the part of the Judge, it must have existed before the suit was tried. Is a party to lie by until near the close of a trial, and when the developments elicited in its progress have induced a belief that the result will be unfavorable, to be then permitted to abandon the tribunal he has himself selected, and try the chances of some other jurisdiction? Such a course would tend to endless litigation. We will not presume that such a proceeding was designed to be tolerated, unless the Legislature shall expressly say so. We think the Circuit Court of Platte county erred in granting the application of Jacob Cox, and shall therefore award the *mandamus* asked for.

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 STATE OF MISSOURI vs. AMES.

1. When an indictment commencing thus: "The grand jurors for the State of Missouri for the county of A," &c., lays the venue "at the county aforesaid," it is well laid.
2. An indictment for keeping a gaming table, charging that the defendant "did keep a certain gambling device, &c., called a faro-bank, and did then and there induce idle persons to play at said gambling device for money," is not double—the acts alleged constitute but one offence.

## APPEAL from St. Charles Circuit Court.

 STRINGFELLOW, *Attorney General, for the State.*

The indictment is in the words of the statute, and the venue properly laid. The indictment begins, "The grand jurors for the county of St. Louis, on their oaths, present, that on, &c., at said county," &c. This is sufficient even without reference to the venue in the margin. 4 Mo. R. 454, *State vs. Palmer, et al.*

 CAMPBELL, *for Appellee, insists.*

1. The indictment is defective in this: it does not in the body of the indictment state in what

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county the offence was committed, but only states the place by a general reference to the name of the county, as mentioned in the preliminary portion of the indictment, where it is stated for what county the grand jury is sworn.

2. Both counts of said indictment are double, and charge two distinct offences; first, the unlawful keeping of a faro bank; secondly, the inducing and permitting persons to bet money and property thereon. The two counts are substantially the same, and if one is bad, both are bad.

McBRIDE, J., *delivered the opinion of the Court.*

Benjamin Ames was indicted by the grand jury of St. Louis county, and obtained a change of venue to St. Charles county, where, on his motion, the indictment was quashed, and the State brought the case to this Court by appeal.

The indictment is in the following words, to-wit:

*"County of St. Louis, ss:*

*"The Grand jurors for the State of Missouri, within and for the body of the county of St. Louis, upon their oaths, present, that Benjamin Ames, late of the county aforesaid, laborer, on the first day of May, in the year of our Lord one thousand eight hundred and forty-six, at the county aforesaid, a certain gambling device, commonly called a faro-bank, adapted, devised and designed for the purpose of playing games of chance for money, unlawfully did keep; and at and upon and by means of the said gambling device, on the said day and year aforesaid, and on divers other days and times, between the day of the taking of this inquisition, there unlawfully and wilfully did induce and permit divers idle and evil disposed persons to play at games of chance for money, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."*

The second count charges the playing to have been for money and property.

The motion of the defendant to quash the indictment sets out the following reasons: 1. There is no venue stated in the indictment. 2. The venue is not properly stated. 3. Indictment does not state in what county it was found. 4. Indictment is otherwise defective, illegal, and insufficient. 5. All the counts in the indictment contain two distinct charges of offence.

Two objections to the indictment have been relied upon in this Court to sustain the judgment of the Circuit Court. The first is the insufficiency of the venue. This objection is said to be sustained by the decision of this Court in the case of the State vs. Cook, 1 Mo. Rep., 390. Taking the statement of that case, made by the Judge who delivered the

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opinion, and the indictment against Cook differed materially from the one now under investigation. The only place where the county was set out was in the margin of the indictment, and the offence was charged to have been committed "at the county aforesaid." And even in that case, where the indictment was so inartificially drawn, the Judge said, "if we are at liberty to judge this case by reason, we would say, the indictment, as to place, is certain enough; but we are bound by authority, unless that authority is manifestly absurd and unjust, and it is not enough that there appears no reason for the authority."

But, recognizing for the present the correctness of the principle laid down in the case of the State vs. Cook, and still the indictment in the case before us may be adjudged sufficiently certain as to place. It sets out in the margin, as did the one against Cook, the name of the county, and then commences as follows: "The grand jurors of, &c., within and for the body of the county of St. Louis," &c. Here, then, the county of St. Louis is laid in the body of the indictment, as well as in the margin, and following the statement in the indictment, the reference by the use of the words "at the county aforesaid," means clearly the county of St. Louis.

The counsel for the defendant is in error, when he supposes the latter setting out "of the county of St. Louis" is in the margin of the indictment. We understand the margin to be the edge of the leaf or page left blank, and the body of the indictment, that part which follows after the beginning or commencement, "The grand jurors," &c.

The next objection to the indictment is, that it is double, charging two offences in each count. Two answers may be given to this objection. First, the indictment is in the words of the statute creating and defining the offence; and, second, the several facts charged are necessary to constitute the offence. *State vs. Palmer & Doll*, 4 Mo. Rep., 453. The Circuit Court erred in quashing the indictment, and its judgment ought to be reversed; and the other Judges concurring, the judgment is reversed and the cause remanded.

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*McClanahan vs. Porter.*

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## McCLANAHAN vs. PORTER.

1. Where lands have been aliened during the life of the husband, the widow is entitled to dower in such lands, according to their value at the time of the alienation, and not according to the increased value of the land since the alienation, by means of the labor or expenditures of the alienee.
2. Where lands, of which the husband died seized, descend to the heir, the widow is entitled to dower according to their value at the time of the assignment, with damages for their detention from the death of the husband.
3. A purchaser of lands under execution against the husband, occupies the same position as the alienee of the husband.
4. Where lands aliened by the husband have depreciated in value from any cause, the widow is entitled to dower according to the value at the time of the assignment of dower.
5. So where lands have increased in value from extrinsic causes not connected with the labor or expenditures of the alienee, the widow takes according to the value at the time of the assignment.
6. Although the widow gains nothing by the improvements of the alienee, she suffers loss by his waste or neglect depreciating the value of the property—this “good rule” not “working both ways.”
7. The widow is neither tenant in common nor joint tenant with the heir or alienee. She has only a right in action until dower assigned.
8. The widow is entitled to damages, not as of any particular period, but as of the value of the property at the different periods in which she is deprived of her dower. In the case of the heir, from the death of her husband—in the case of an alienee, from the time of her demand until the assignment of dower.
9. In estimating the damages, the jury are to consider the value of the property, not merely up to the institution of suit, but up to the trial.

## APPEAL from Morgan Circuit Court.

*HAYDEN, for Appellant, insist:*

1. That the plaintiff gave no evidence to the jury to show that the said William C. Porter, in his lifetime and during her coverture with him, was seized of such an estate in the lands, &c., which were purchased by the defendant under execution, as entitled her to dower therein, or to damages, &c., for not having assigned the same therein; but, on the contrary, the only evidence given by the plaintiff to the jury is, that Green L. Douthitt, as sheriff of Morgan county, levied certain executions issued upon judgments of the Morgan Circuit Court against said Wm. C. Porter, N. Porter, and Jefferson Porter, upon the lands mentioned in the deeds from him as sheriff, and



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sold the same to John McClanahan, as the property of *all* the defendants in said executions, and not as the property of said William C. Porter *alone*, so that it does not appear *what estate* the said William C. Porter had in the land when defendant purchased it; whether it was an estate in fee for years, at will, or at sufferance; nor that the plaintiff *was the wife* of said Wm. C. Porter when the defendant purchased the land; and consequently the jury found against law and evidence, and their finding ought to have been set aside and a new trial granted.

2. That the court erred in permitting the plaintiff to give evidence to the jury conducing to show the value of the mills and premises at the time the same were purchased by defendant, and thence down to the institution of this suit; because, among other things, the proof was calculated to mislead the jury, being wholly irrelevant to the issue. See 5 Serg. & Rawle, 289, 290, 291 and following; 3 Mason's Rep. 374-5, Powell and wife vs. the Monson and Brimfield Manufacturing Co.; see 4 Kent, 68, 67, 66, 65, &c.

3. That the court erred in not permitting the defendant to prove that he did not *in fact* deforce or oust the plaintiff from her dower in the land, and that she might have gotten it without suit, (if she were entitled to any) by showing, as he offered to do, by testimony, that from the time he took the possession of the mills, down to his abandonment of the possession thereof, he offered to, and requested the plaintiff, not only to join him in the possession and occupancy of the same, but also requested her to call and get at the mills, from time to time, as the same were produced thereby, more than her just proportion of the rents and profits thereof. See Digest 1835, sec. 16, page 228; sec. 19, 23, 24; 4 Kent, 369, 370.

4. That in this case the plaintiff cannot recover damages from the defendant by reason of his occupancy of the mills, unless he deforced the plaintiff of her dower therein, either by denying her right thereto, or by refusing to permit her to enjoy the same as a tenant in common with him. That the plaintiff in this case, if interested at all in the lands, &c., is interested as tenant in common with him, holding an estate for life, whilst he is tenant in fee; and that thus standing related or interested in the estate as tenants in common, he had the right to the enjoyment of the whole of it unless denied him by his co-tenant, by her demand of her share, and his refusal thereof to her.—That one tenant in common, who is in possession of the estate, is not bound to pay *rent*, either in the shape of the product of the estate or in money, to his co-tenant—each having his undivided right to the possession of the whole estate; and hence it is, that upon principle, neither can demand that one shall be a tenant to hold under the other and pay rent against his will and consent for the enjoyment of that of which he is legally possessed *in his own right*. 4 Kent, 36, 370-1; 12 Mass. R., 149, 150, &c.; Eben Parsons adv. Ignatius Sargeant, Coke Lit., 200, (b.)

5. That the plaintiff in this case had no right as tenant in common with the defendant, or otherwise to demand or have damages of the defendant (even though he had remained in the possession of the mills from the time of instituting the suit down to the finding of the jury) for his possession thereof for the time, if the same were valueless on account of their being out of repair and unfit for use, unless the same were occasioned by the tortious acts of the defendant. That, upon principle, his possession in such case is legal, and of which the plaintiff could not complain, and therefore, unless by *his tortious* acts he renders the estate unfit for occupancy or for enjoyment, (thereby *indirectly* denying the use thereof to his co-tenant,) he is not responsible in damages.—See the following authorities: 12 Mass. Rep., 68, 69, 70, &c., Elisha Doan vs. Daniel Badger; 4 Mass. R., 574-5, &c., Edward Long vs. Sarah Bacon; see 5th vol. Serg. & Rawle Rep., 289, 290, 293, Thompson vs. Morrow.

6. The appellant will insist that the Circuit Court ought to have given all and every the instructions to the jury as prayed for by defendant, and that the court erred in giving to the jury those which were given to them at the instance of the plaintiff; and also that the Circuit Court ought to have set aside the verdict and have granted defendant a new trial.

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*McClanahan vs. Porter.*

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NAPTON, J., *delivered the opinion of the Court.*

This was a suit for dower brought by the appelle, Betsey Porter, in the Circuit Court of Kinderhook county, but afterwards removed to the county of Morgan, and there decided. The petition charged that the petitioner was deforced of her dower in a small tract of land in Kinderhook county, upon which there was a saw and grist mill. A plea was filed and an issue made up, which resulted in a judgment by the court that the petitioner be seized of her dower in said lands, and commissioners were appointed to assign the dower. These commissioners reported that the lands were not susceptible of division, being only valuable on account of the mill which was erected on them. A writ of enquiry was then awarded, and a jury was summoned to ascertain the yearly value of the plaintiff's interest, and to assess the damages she had sustained by reason of the deforcement. Upon this trial, it appeared that this tract of land, with the improvements upon it, had been sold in the lifetime of W. C. Porter, the husband of the petitioner, by virtue of two executions against him, and had been purchased at said sale by the defendant, McClanahan. It appeared, from the testimony introduced by both parties, that this mill, partly in consequence of back water from the Osage during the great freshet in that river in 1844 and 1845, and partly from inattention to repair on the part of McClanahan, had become almost or entirely valueless, and the principal part of the testimony on the part of the plaintiff seemed designed to show that this deterioration in value had been occasioned by the negligence of McClanahan, whilst testimony was offered in behalf of McClanahan to show that it was not by any fault of his that the property had become valueless. The defendant also proposed to prove that after the death of Porter, the husband of plaintiff, he had requested and urged the plaintiff to join him in the occupancy of the said mill, or to call at the mill from time to time for her proportion of the rents and profits of the same, but this proof was excluded by the court. The court instructed the jury:

"That in assessing the plaintiff's damages, they must estimate the property named in the petition according to one-third of the yearly value thereof at the time of the purchase of the same by the defendant, taking into consideration any deterioration in the yearly value thereof from the time of the alienation down to the time of the commencement of this suit, if such deterioration was not caused by any act or negligence of the defendant; and that they should also assess the damages according to one-third of such value from the time of the commencement of this suit to the time of this verdict." But the jury were directed, in fixing the

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yearly value of the property, not to consider any deterioration in the value of said property from any cause whatever which accrued after the commencement of this suit.

Several instructions were asked by the defendant, the object of which was to get an opinion from the court that McClanahan was not responsible for negligence in the management of this property, but that the plaintiff must loose from deteriorations in the value of the property, from whatever cause they originated, provided they were not occasioned by the wilful destruction or gross negligence of the defendant. These instructions were refused, and the damages were assessed under the instructions of the court above stated. The proper steps were taken to save exceptions to the opinions of the court, and the case brought here by appeal.

It is well settled that where lands have been aliened during the lifetime of the husband, the widow is entitled to dower in such lands according to their value at the time of the alienation, and not according to the increased value they may have acquired since the alienation by reason of the labor or expenditures of the alienee. This rule is however an exception to the general rule on the subject, and has been made to favor the alienee, and place him in a more advantageous position than the heir. It has been adopted on principles of public policy, being calculated to promote the interest of the alienee, and at the same time not impairing the just rights of the widow. The general rule, which applies to all cases where lands descend upon the heir, the ancestor dying seized thereof, is that the widow is entitled to her assignment of dower in the lands of her deceased husband, according to their value at the time of the assignment, with damages for their detention from the time of the husband's death. This is the rule of common law as modified by the statute of Merton, and is the rule adopted by our statute.

Most, if not all of the cases which have been adjudicated, touching this question, have been cases in which the value of the land has appreciated since the death of the husband. In these cases, the distinction has obtained to which we have just alluded. The present is a case in which the land has depreciated in value since the death of the husband, and the only question is whether, in assessing the damages and in assigning the dower, this depreciation is to be considered; whether it has arisen from extrinsic or collateral causes, or from any act or negligence upon the part of the alienee. We assume that the purchaser at the sheriff's sale during the lifetime of the husband stands in the same attitude with the husband's alienee, and whatever principle may be established in re-

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lation to one, will govern the rights and interests of the other. It is conceded in the instructions which the Circuit Court gave to the jury, and we presume the position is undeniable, that where the depreciation has arisen from natural or artificial causes, apart from any acts or omissions of the alienee, he is not responsible for the loss to the widow, but she must be endowed according to the value of the lands at the time of the assignment, depreciated as they are since the death of the husband. But where the depreciation has been occasioned by acts or omissions of the alienee, the Circuit Court held, that the dowress should not suffer by such depreciation, but that the alienee should be responsible for the same, and the assignment should be made without reference to such depreciation. We think this distinction is unfounded. We know of no principle of law or of natural justice which will hold the alienee responsible for a depreciation arising from causes of this character, any more than for such depreciation as arises from extrinsic and collateral causes.

It has been determined in some of the courts, that in the case of an alienation by the husband, the widow shall be entitled to dower according to the increased value of the property, where such increase of value has arisen from extrinsic causes, disconnected with the labor or expenditures of the alienee. The converse of this proposition is also true, that where the property has depreciated from similar causes, the widow shall only be entitled to dower according to such depreciated value. So it has been uniformly held, as we have before stated, by all the courts, that the widow shall not be entitled to avail herself of the improvements made by the alienee. But the converse of this last proposition is not necessarily true. The familiar adage, applicable however rather to mathematical reasoning than to legal disquisitions, that "it is a bad rule which will not work both ways," will not settle this question. Because a direct proposition is true, it does not always follow that the converse of it is equally so. The rule which deprives the widow of the benefit of improvements made by her husband's alienee, is a rule established for the benefit of the alienee. It is an exception to the general rule on the subject. It does not follow that because the widow shall derive no benefit from the improvements made by the alienee, she shall not therefore lose by his waste or mismanagement. The rule was solely to favor the alienee, and the protection of the interests of the widow against devastations was left to another principle more powerful and more safe than any legal rule which could have been established. I mean that of self interest.

Let us take the case of the heir, and see how the widow's interests are protected. In this case, the widow has her dower assigned according to



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the value of the lands at the time of the assignment. Whatever may be the condition of the estate, whether it has improved by the good management and judicious expenditures of the heir, or has appreciated by the rise of lands in the neighborhood, or from any other cause, she takes her proportion in the condition in which it is found at the time of assigning her dower. So if the lands have depreciated, either from the decline in the value of land generally, or from gross mismanagement and waste of the estate by the heir, the same rule of assignment must be observed. The heir is tenant in fee, and not responsible for waste. Even a tenant in tail was not responsible for waste. 1 Cruise Dig., p. 60, sec. 32. The widow is not a tenant in common with the heir; her right rests in action only, and at the common law, after the expiration of her quarantine, the heir could expel her and put her to her suit. *Jackson vs. O'Donaghy*, 7 John. Rep., 247. The dowress takes in severalty, and is neither a joint tenant nor a tenant in common with the heir. *Coke Lit.*, fol. 35, b. If the heir thinks proper to cut down all the timber, or pull down all the houses on the estate, such devastation will not be taken into consideration in the assignment of the widow's dower. I allude not now to the question of damages, for no question of that sort arises in this case, but to the rule of assignment. If we revert to the original mode of assigning dower, which was by metes and bounds, it becomes obvious that this assignment must take place without reference to any injury the estate may have received from the heir. The question of damages in such case would be another question. As the widow is entitled to damages from the time of the death of her husband, where he has died seized, these damages would of course be proportioned to the actual value of her dower at the different periods from the death of the husband to the institution of the suit or the time of assignment. This is the rule laid down by our statute, which says that these damages shall be "the value of the whole dower to her belonging, from the time of her husband's death." And this was the rule recognized by the court in the case of *Rankin and others vs. Oliphant*, 9 Mo. Rep., 239. In the present case, the widow was only entitled to damages from the time of giving notice of her claim, and as no notice was given, except by commencing suit, and the assignment of dower was considered by the Circuit Court as relating back to that period, the same value which regulated the assignment would, according to the principles adopted by that court in relation to the time at which the value of the property was to be estimated, be the rule for estimating the damages from the commencement of the suit down to the finding of the jury.

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If, then, it be the law that, as against the heir, the widow would take her dower according to the value of the land at the time of the assignment, however much it may have depreciated in value since the death of her husband, and from whatever causes this depreciation may have arisen, can it be that the alienee of the husband is in a worse condition than the heir? We have seen that in one respect an exception has been made to favor him. Is there any principle of law or of natural justice which requires an owner of lands to improve them or to make such repairs as may prevent an estate from going to waste? Is not this wisely left it that sense of self interest which usually governs men in the management of their own affairs? The heir and alienee have an interest proportioned to that of the widow, we will suppose, of at least six to one. Whatever impairs the value of the estate, necessarily injures the interests of the heir or alienee in a much greater proportion than that of the widow. The law did not intend that a jury of twelve men, however impartial they might be, should decide for a land owner what disposition he should make of his property. The circumstances of the present case would be sufficient to show the impolicy and impropriety of such interference.— Here is a small tract of land, whose whole value arises from a saw and grist-mill erected on it, driven by water power. The value of such property depends, as every day's observation shows, on a variety of circumstances, some of which are beyond the control of the proprietor.— The stability of the dam—the constancy of the water course—the mechanical skill of the owner, are frequently all necessary to make such erections profitable in this country, and in a sparsely settled region; and in the vicinity of the Osage or Missouri, whose waters are sometimes raised to such a height as to fill up, and even overflow for months in succession, the small streams which are tributary to them, all these circumstances combined are insufficient to secure a profit to the mill owners.— Shall a jury, in such a case be permitted to determine for the proprietor whether it is his interest or not to keep his mill in repair, or whether he may abandon it as useless and unprofitable? This is a matter for the proprietor himself to decide. He might have used the mills or suffered them to rot down, or convert the timbers into fire wood, as he thought best for his interests. This right he acquired by the purchase of the estate. He is certainly responsible in damages to the widow from the time of her demand, but these damages would be exactly proportioned to the value of her dower from the time of demand to the time of assessment. It would not affect his rights to make such alterations in the nature or value of the property as he might think best.

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These considerations suggest another question, which, though it was not raised or discussed in the case here, may yet require notice. The Circuit Court directed the jury not to take into consideration any deterioration of the property after the commencement of the suit, no matter from what causes it originated. I do not know that there was any proof of a material change in the value of this property after the commencement of this suit, so as to make this question important in the final determination of this case, but cases might arise in which such a question would be very important. It seems to have been the opinion of the court, that the assignment by the jury related back to the commencement of the suit, and the witnesses would only be permitted to speak of the condition of the property at that time. This unquestionably is the practice in suits at law ordinarily, yet I am unable to see the propriety of adopting it in a suit for dower. If the assignment be made by metes and bounds, as it must be where it is practicable, do the jury, who make such assignment, make it with reference to any other condition of the land than the one in which they find it at the time they are making the assignment? I presume not. The substitution then of an estimated amount of yearly value for a specific allotment of a portion of the land, must be governed by the same principles which regulate the specific assignment in land. If, after the commencement of the suit, and before the time of the trial, the buildings on the premises are destroyed by fire, would the jury be authorized to consider the value of these buildings in their assessment? In fixing the damages, they would of course consider the value of the buildings until the period of their destruction, but not beyond that; and if, in the assignment of dower, either by metes and bounds, or by the statutory substitute of money, they take the value of these destroyed buildings in their estimate, they cannot be said to assign *one-third* of the lands to the widow, but some other proportion. The widow has nothing but a right in action until dower is actually assigned to her; she cannot maintain ejectment before an assignment. *Jackson vs. Vanderheyden*, 17 John. R., 167. The idea that she is availing herself of the process of the court, for the purpose of recovering the possession of land to which she has *title*, is a mistaken one. She is tenant in dower after her dower is assigned, and not until then. As the jury are required to view the premises in person, and lay off her proportion in metes and bounds, they must do so with reference to their value at the time this personal inspection and examination is made, and not with a view to its value months or years before, when the suit for dower was instituted. If the contrary were the law, then the jury must have wit-

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nesses before them for the purpose of ascertaining what amount of injury had been done the estate, either by the acts of God or of the tenant.— But no such authority has been given to the jury by our law, and it is therefore evident that no such action was contemplated. And surely the same principle which governs the jury in laying off the widow's dower by metes and bounds, must be the rule of action for the jury which assesses in money the yearly value of that dower, after it has been ascertained that a division by metes and bounds is impracticable.

I have not referred to any authorities upon these questions, because I have found none in which the precise points were involved; but in several cases which were referred to in the case of Rankin and others vs. Oliphant, the courts seemed to assume the law to be as I have stated it. Chancellor Kent, in reviewing the state of judicial opinion on this subject, in his commentaries, though he does not consider directly the law in cases of depreciation of property, seems to assume it as settled, that the widow takes her dower according to such depreciated value. In speaking of the rules by which the alienee is favored in having his improvements exempted from the claims of the dowress, he says: "The rule is founded in justice and sound policy; and whether the land be improved in value or be *impaired by acts of the party* subsequently, the endowment, in every event of that kind, is to be according to the value at the time of the assignment, if the land descended to the heir." Again, in discussing the question whether the widow shall be entitled to the advantage of the increased value of the land arising from extrinsic and collateral causes unconnected with the direct improvements of the alienee, he says: "The allowance would seem to be reasonable and just, inasmuch as the widow takes the risk of the deterioration of the estate arising from public misfortunes, *or the acts of the party.*" It must follow that the widow is equally subjected to this risk in cases of an alienation of the land during her husband's lifetime, as where the land has descended to the heir; for if the law were otherwise, the condition of the alienee would be worse than that of the heir. Whereas it has been the manifest policy of the law to give the alienee all the advantages of the heir, and, in one important particular, to give him a decided preference.

The other Judges concurring, the judgment is reversed and the cause remanded.

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*Stewart vs. Pettus, to use of, &c.*

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## STEWART vs. PETTUS, TO USE OF, &amp;c.

1. A person having made a will in another State, moves to this State, and resides here until death. The will must be admitted to probate here, and not in such other State.
2. Where there are two trustees, and one dies, the other takes by survivorship.

## APPEAL from Lincoln Circuit Court.

*WELLS, for Appellant, insists:*

1. The paper offered in evidence as a will, is not a will. It was never proved and recorded in this State, as required by the statute on wills. It was illegal to prove it in Virginia; no law of either that State or this authorizes the proof of a will of a citizen of Missouri in Virginia. This point is settled by reference to the evidence and our statute on wills.
2. The will vested no legal title in Pettus. It willed the property to Peggy Batte, and merely gave a power of control to Coleman and Pettus.
3. If any legal estate vested by the will in Coleman and Pettus, it does not vest in Pettus by survivorship, upon the death of one trustee. If both trustees had died, where would the legal estate have vested? Certainly in their administrator.
4. The court erred in excluding the evidence of Mrs. Batte's assent to the sale. It was competent to shew fraud. If the trustees leave the property in her hands, she is their agent, and her acts affect their title.
5. The verdict was clearly against the instructions of the court.

*CAMPBELL, for Appellee, insists:*

1. The will of Tabitha Batte was admitted to probate in the State of Virginia, where the party lived at the time of execution, according to the laws of that State, and need not be admitted to probate in this State. See case of Allison vs. Bowles, 8 Mo. Rep.
2. The possession of the negro after the death of Tabitha Batte was in Peggy Batte, and the creditors of Thomas C. Batte had no right to seize on her for his debts.
3. The will must be construed liberally according to its obvious intent and true objects, which was to secure the property to Peggy C. Batte, and to prevent it from becoming liable for the debts or acts of Thomas C. Batte, in any event whatever, and for that reason its terms must be taken not in a strict technical sense, but in such sense as will carry into practical legal effect the intentions of the testatrix.
4. The obvious intention of the will was to vest the control and management of the property in the trustees for the benefit of Peggy C. Batte, according to its directions, and that the powers of trustee should be exercised either by Pettus or by Coleman, as the property might be in Virginia or Missouri at the time of her death.
5. It was competent for Tabitha Batte to make a will creating a trust peculiar in its nature, and differing somewhat from ordinary trusts, and that she appears to have done, and the will should be carried out in conformity to the true intent of the testatrix, disregarding mere forms of expressions.

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*Stewart vs. Pettus, to use of, &c.*

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6. The statutes of this State do not prohibit the probate of wills in a manner different from the modes specifically pointed out in the statute.

7. There is no evidence that either the defendant or Thomas C. Batte ever had any title or pretence of title to the slave.

SCOTT, J., *delivered the opinion of the Court.*

Tabitha Batte, in the year 1836, resided in the State of Virginia, where she made her last will and testament in conformity to law. By this will, she bequeathed, in trust to William G. Pettus and James Coleman, all her property for the benefit of Peggy C. Batte, her daughter-in-law, and wife of Thomas C. Batte, who, at that time, resided in Missouri. Afterwards, Tabitha Batte removed from Virginia to this State, where she continued to reside until her death in 1840. Her will was admitted to probate in Virginia, but no probate of it was ever made in this State.— A portion of the property conveyed in trust was a slave named Mary, who had a child (Washington) after the date of the will. These slaves, after the death of Tabitha Batte, were levied on and sold under execution against Thomas C. Batte. They afterwards came to the possession of Grief Stewart, the appellant. Coleman, one of the trustees, having died, this action of detinue was brought by Pettus, the surviving trustee, for the recovery of the slaves. On the trial, Pettus, the trustee, read in evidence an authenticated copy of the will and probate in the State of Virginia. This was objected to by Stewart, and after a judgment against him, he appealed to this Court.

The point in this case was determined in *Nat vs. Coons*, 10 Mo. Rep. Tabitha Batte, at the time of her death, being domiciliated in this State, her will should have been proved here, and no foreign probate was evidence. The general principle that the probate of a will is conclusive when introduced collaterally, is not applicable in this case, as the facts disclose a want of jurisdiction over the subject in the tribunal granting it. 2 Greenleaf, sec. 339. The will conferring the right to the slaves on the trustees, the instrument itself, and not the probate, is the foundation of their right. The cause will be remanded, that a probate of the will may be taken out in this State. *Woolly vs. Clark*, 5 Barn. & Ald., 744; 1 Sal., 302.

In the case of joint trustees, the trust survives on the death of one of them. The distinction is between mere powers uncoupled with an interest and trusts. Joint powers, in matters of mere private concern, are extinguished by the death of one of the persons entrusted with it: not



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so in the case of trusts; they survive to the survivor. 1 Thos. Coke, 739; 1 Dow. & Ry., 259, Read vs. Goodwin.

The other Judges concurring, the judgment will be reversed and the cause remanded.

COATS, ET AL., VS. ROBINSON & HENDLEY, ADM'RS, &C.

1. A *femme covert* is regarded in equity as to her separate property, as a *femme sole*.
2. Where a *femme covert* gives a note or bond, it is presumed that she intends to charge her separate property.

APPEAL from Callaway Circuit Court.

TODD & SHEELEY, for *Appellants*, insist:

1. That the court cannot decree the sale of the slaves, as they were not made by contract subject to the debt.
  2. The complainants intestate concealed defects and misrepresented the location of the land, and the price agreed to be given is greatly beyond the true value of the land, and is not fair and reasonable, and specific performance should not be enforced. Story's Eq., sec. 769 and following; King vs. Hamilton, 4 Peters Rep., 311; 2 Story's Eq., sec. 778; Sugden on Vendors, 194; Gowger vs. Gorden, 4 Blackford, 110; Gorden vs. Gowger, 4 Blackford, 231; Cook, ex'r., vs. Grant, 16 Serg. & Raw., 210.
  3. The complainants should have shown themselves able to convey the land sold by their intestate, by exhibiting a chain of title papers, before the court could, upon their prayer, decree a specific performance. In this case, they are unable to convey the land sold. Jarman vs. Davis, 4 Monroe, 118; Judson vs. Wass, 11 Johns. Rep., 525; Sugden on Vendors, 410; Hepburn & Dundas vs. Colinauld, 5 Cranch, 262; Bates vs. Delavan, 5 Paige Rep., 299.
  4. Part performance of a contract cannot be enforced by a vendor against the vendee. The vendee is entitled to his whole contract, and any abatement in price must be made at defendants' request, and upon the prayer of defendants to take part and damages as the balance. Story's Eq. Jur., sec. 769 and following. It is then settled that it requires a much less strength of case for a vendee to resist than for a vendee to enforce specific performance. Jones vs. Shackelford, 2 Bibb, 410; McConnell's heirs vs. Dunlap's devisees, Hardin, 41; Sugden, 270; Waters vs. Travis, 9 Johns. Rep., 450.
  5. That portion of the land included in the farm of Johnson, and to which he had no title, being a material part of the farm, a deduction (if any at all is made) should have been made at the highest prices. Stevenson, &c., vs. Harrison, &c., 3 Littell, 170; Pringle vs. Samuel, 1 Lit., 46.
- A court of equity will not decree a specific performance of contract when it would be hard and unconscionable. Seymour vs. Delancy and others, 6 Johnson Chan. Rep., 222.

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It may be shown in equity that the written contract does not contain all the contract. Dwight vs. Pomeroy, 17 Mass. R., 303.

The party taking personal security does not retain a lien even on the land, and such contract shows that a lien was not retained on the separate property of the wife.

The bill alleges a special contract of lien on the slaves. None such is proven. Can a decree be made upon the implied equity to subject all the estate? And can such equity exist where personal security is taken?

The law abolishing imprisonment for debt, applies to this case.

*LEONARD, for Appellee, insists:*

1. A bond or promissory note of a married woman to pay a debt, is a charge upon her separate property, and equity will make this charge available by directing her separate property to be applied to the payment of the debt. Murray vs. Barber, 9 Com. Eng. Chan. Rep., 1-9; Hulme vs. Tenant, 1 Brown's Chan. Rep., 14.

2. The proof utterly fails to establish any false or fraudulent representations on the part of Johnson upon the sale of the land, in relation to its situation, quantity, and quality.

3. There is no proof of any deficiency in the quantity of land or improvement; but if there be even the alleged deficiency, it is a case for compensation, and no ground for withholding an execution of the contract, and the compensation allowed in the decree is ample for the alleged deficiency.

4. Mr. and Mrs. Coats never tendered bonds to Johnson in his lifetime in payment of the note; nor to his administrators since his death, except upon the condition that they would make an abatement in the amount of the note; but if bonds were tendered and refused before the commencement of the suit, that constitutes no bar to the relief given. The defendants have not alleged or shown their present willingness or ability to pay in bonds, nor have they brought the bonds into court, or offered to pay in that way.

*NAPTON, J., delivered the opinion of the Court.*

The administrators of Joseph D. Johnson filed a bill in chancery in 1845, against William Coats and his wife and Thomas Callaway and the heirs of said Johnson, for the purpose of obtaining payment of a note executed by said Coats and wife and Callaway, out of the separate estate of said Cena Coats. The facts charged in the bill were, that in 1843, Johnson, the intestate, sold his farm in Callaway county to Mrs. Coats for \$1250, and took a note signed by her and her husband and Thomas Callaway for the amount, payable in twelve months. The title was to be made when the purchase money was paid, and for this purpose Johnson gave a title bond to Mrs. Coats. The bond for title calls for "162 acres including all the farm on which said Johnson resided," being a half quarter and two quarter quarter sections of land. Immediately after the purchase, Mrs. Coats and her husband took possession of the land. Previous to the marriage of Mrs. Coats to Mr. Coats, a marriage contract

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had been made between them, by which she reserved to herself the exclusive management of her separate property. She was at the time the owner of four slaves and of some real estate. Johnson died intestate in the spring of 1844, and the complainants were his administrators. The bill charged that Coats, the husband, and Callaway, were insolvent, and that there was no other property out of which the note could be made, except the separate property of Mrs. Coats.

The answers of Callaway, Mr. Coats and his wife, admitted the principal facts charged in the bill, but denied that Mrs. Coats intended to charge her separate property, and insisted that it was understood between the parties that Johnson was to take certain cash notes and bonds; that Johnson died before these notes were tendered, and that his administrators have since refused to receive them.

They also relied for a defence to this suit, that Johnson's conduct in the sale was fraudulent—that he represented that the tract contained one hundred acres of arable bottom land, when there were only about forty-three—that he represented that all his farm was upon his land, when there were about eight and a half acres, including a tobacco barn, upon public land—and that he further represented the tract to contain 162 acres, when in truth it only contained 156 acres.

Upon the hearing, it appeared in evidence that the parties went to Johnson's house to conclude the contract and prepare and execute the writings; that Mr. Coats wrote the title bond, and whilst writing it, enquired of Johnson for his title papers, who replied that he had only one of them in the house and that the others were in the clerk's office at Fulton; that he could come near the number of acres, which he thought were about 165, but told Mr. Coats to put down 162, to avoid going over the number. After the title bond was executed, it was suggested that Johnson should take in payment of the note executed by Mrs. Coats and her husband and Callaway, some cash bonds and notes that were to be assigned to her by Lieper & Henderson. To this, Johnson assented. There was no evidence of any representation by Johnson in relation to the character or quantity of the land, other than might be inferred from the title bond. It appeared that there were only about 42 or 43 acres of bottom land, and that about eight acres of this were outside of Johnson's title. The witnesses who were examined seemed to agree that the land was not worth more than one-half of the price which Mrs. Coats had agreed to give for it.

The Circuit Court decreed that the complainants were entitled to the payment of the note, with interest, out of the slaves, deducting sixty-six

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dollars as a compensation for a deficiency of about eight acres, with the building thereon; and for this purpose, a commissioner was appointed to sell the slaves, in the event the money was not paid. It was further decreed, that upon the satisfaction of this decree, the title should vest in Cena Coats, to her sole and separate use. From this decree the defendants appealed.

It is well established by a current of decisions, both in England and this country, that a *femme covert*, with respect to her separate property, is regarded in a court of equity as a *femme sole*, and that when she enters into agreements which indicate her intention to bind her separate property, such agreements will be effectuated by the court, unless they are characterized by fraud or some unfair advantage. *Bullfer vs. Clark*, 17 Ves., 375; *Norton vs. Turvill*, 2 P. Wm's., 144; *Anon.*, 18 Ves., 258; *Greatly vs. Noble*, 3 Mad., 79; *Stewart vs. Ld. Kirkwell*, 3 Mad., 387; *Murray vs. Barber*, 3 Myle & K., 1; *Jacques vs. Meth. Ep. Church*, 17 Johns. R., 548; *Ewing vs. Smith*, 3rd Eq. R., (S. C.) 447; *Richardson vs. Duggets*, 4 Vt. R., 336. Where the *femme covert* executes a bond or a note, or accepts a bill, it is held that she must intend by such instrument to bind her separate estate, because these acts would otherwise be nugatory, and these instruments could in no other way have any validity or operation. The application of these principles to the present case seems clear, and the only points open to enquiry would appear to be the fraud and misrepresentation charged in the answers. These charges were, however, entirely unsupported by proof. There was no evidence that any representations of any kind were made, either in relation to the quality of the land or the extent of arable land, or in relation to the quantity of acres embraced by the whole tract. The only representation on the subject of the quantity of land was that contained in the title bond, in which it is stated that the half quarter and the quarter quarter sections agreed to be conveyed included the farm of Johnson. This title bond was written by Coats himself, and though it appears that the number of acres was incorrectly stated, it does not appear that this mistake was either a dishonest or a material one. The Circuit Court, in its decree, allowed a compensation for the eight acres found to be on public land, and there can be no doubt that this deficiency was a proper subject for compensation, and could constitute no obstacle to a specific execution of the contract. *Reynolds vs. Vance*, 4 Bibb, 215. The bargain, it is true, seems not to have been an advantageous one on the part of Mrs. Coats; but the witnesses who gave their opinions in relation to the value of this tract, do not give any facts by which the propriety of their estimate could be

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ascertained. Nothing can be more various than the opinions entertained by different individuals in relation to the value of a farm. So many different circumstances enter into the consideration of those who make the estimate, which are differently appreciated by different tastes, that it would be very unsafe to predicate the interference of a court upon testimony of this character, where there is no mark of fraud or concealment, or any undue advantage. We shall therefore affirm the decree of the Circuit Court.

SCOTT, J., dissenting.

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USHER, ADM'R., vs. THOMAS.

Under the late act which authorized a *ca. sa.* on a judgment, the officer, under an execution against two, could not take the property of one defendant and the body of the other.

APPEAL from Chariton Circuit Court.

CLARK, for Appellant, insists :

1. That it is a well settled principle of law that an arrest of a defendant under a *ca. sa.* and a release or discharge by order of the plaintiff, is a satisfaction of the judgment upon which it issued; if it is the same thing where sufficient property to pay the judgment is levied upon by virtue of a *fi. fa.*, and the same is returned by order of the plaintiff, without selling the property; in both instances, the acts of the plaintiff in causing the writs returned, prevents another issue upon the ground that it is a discharge of the judgment. 3 Mo. R., 249; 12 John., 207; 2 Tidd; Bacon Abr., title Ex., 720; 8 John., 366.

2. This being a joint judgment, and Watson, one of the defendants, being arrested and then released by the plaintiff, Usher, the present defendant's intestate, who was Watson's co-defendant in the *ca. sa.*, was also thereby released. The release of one of two in a joint specialty or judgment, is clearly a release of both.

3. In this case, the present defendant was but the security of Watson in the original debt, and therefore any act of the plaintiff which released Watson from the payment of the same without the consent of the security, is a release of the security.

4. If the judgment of the plaintiff was satisfied or discharged by operation of law, or, in fact, at the time the defendant made the promise sued upon in this case, there was no consideration upon which to base the contract or undertaking, and therefore he was not bound by it. The ignorance of the defendant that the plaintiff could not have forced him to pay at the time he promised, can make no difference; the question is, could he have done so? If not, the promise and undertaking made upon the presumption on his part that he was at the time bound, when in fact he was not, is



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a naked undertaking, without any consideration to support it, and is void. Story on Contracts, 77; 4 Mass. R., 443; 7 Mass., 432, 483; 5 John., 264; 1 D. & East, 712; 4 East, 455.

*DAVIS, for Appellee.*

The only error complained of is the act of the court in rejecting the evidence offered by the defendant.

The Circuit Court ruled that the evidence offered was immaterial, and if the facts proposed were proved it afforded no defence to the plaintiff's right of recovery. See Story on Contracts, page 70; Metcalf R., 270; Turner vs. Crigler, 8 Mo. Rep., 16.

*SCOTT, J., delivered the opinion of the Court.*

This was an action on promises, brought by Thomas, the appellee, against Caton Usher, in which Thomas recovered judgment. After the recovery of a judgment, Caton Usher died, and this suit was revived in the name of Mary Usher, his administratrix.

In May, 1841, John Thomas recovered a judgment against Thomas Watson and Caton Usher. On this judgment an execution was issued, which being about to be executed, Usher promised Thomas that if he would direct the sheriff to return the execution not satisfied, without a sale of his property, he would pay him \$100 at the return of the writ, and the balance of the debt on Christmas following. In pursuance of a written direction to the sheriff, the execution was accordingly returned. On the execution was the following endorsement, made by the sheriff:—  
 "By virtue of the within writ, I took in my custody the body of said Watson, in said county of Chariton, on the — day of —, 1841, and afterwards, to wit, on the — day of —, 1841, I was ordered by said Thomas to stop the proceedings under said writ, and return the same." On the promise above set forth, this action was founded. The defendant offered to prove that the execution in evidence was the only one in the hands of the sheriff of Chariton county in favor of the plaintiff against the defendant and Thomas Watson; that the sheriff had arrested the body of Watson by virtue of an execution and released him before the said promise of the defendant. The court ruled out this testimony, and the defendant, Usher, excepted and appealed to this Court.

There is no doubt of the correctness of the proposition of the appellant, that an arrest of a debtor under a *ca. sa.* and a discharge therefrom, by the plaintiff in the execution will be an extinguishment of the debt; and that a release or discharge of one of two joint debtors, will be the discharge of both, if effected with the consent of the creditor.

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The proof offered in this cause does not show that Watson was discharged with the consent of the plaintiff in the execution. If he was discharged by the sheriff in consequence of the agreement between Thomas and Usher, they not knowing of his arrest at the time of the agreement, such a discharge would extinguish the debt. From the sheriff's return, it would seem that he was discharged in consequence of the agreement between Thomas and Usher.

At the common law, if two be jointly sued for a debt, a creditor could not have a *capias* against one and another kind of execution against the other. The law gave three or four kinds of executions, not altogether, but by way of choice, whereof the *ca. sa.* was one; and when the body was taken, it was full execution and could not be for part; it was an election of itself of that kind of execution, and a renouncing of the rest. *Foster vs. Jackson*, Hobart, fol. 59, a. By our law in force at that time, the *fi. fa.* and *ca. sa.* were blended in one writ. That writ commanded the sheriff to make the money by a levy and sale of the goods and chattels, lands and tenements of the debtor, and for a want of a sufficiency of these, he was required to take the body. Construing this writ in reference to the common law, it would seem clear, that under it a sheriff could not, on a joint execution against two, take the property of the one and the body of the other in satisfaction of the debt. The terms of the writ only authorized him to take the bodies when there was not a sufficiency of goods, lands and chattels. Whether there was such, should have been first ascertained; and if it was found that there were none, or not a sufficiency, the bodies might have been taken. Here it appears that Usher, one of the joint debtors, had sufficient property to satisfy the debt: if he had, then Watson's body could not have been lawfully taken, and his subsequent discharge was no injury to the defendant, Usher, nor was it a matter of which he could complain. The injustice of seizing under a joint execution one debtor's body and another's property, is too glaring to receive any countenance.

The other Judges concurring, the judgment will be affirmed.

## COTTLE vs. SYDNOR.

The estoppel of a deed only extends to the parties and privies thereto, and not to strangers.

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2. A party is not estopped by his declarations, nor by an admission by deed, except as to the parties and privies to the same, from claiming the true lines of his land.
3. Although as a general rule a party in actual possession of part, claiming the whole tract, is deemed in possession of the whole, yet this will not apply as against the real owner also in possession of part, claiming the whole. The only adverse possession as against such owner is actual possession.

See Harold and wife vs. Bailey, 9 Mo. Rep., 326.

### ERROR to Lincoln Circuit Court.

#### PORTER & WELLS, for Plaintiff, insist:

1. The third instruction is erroneous, because it assumes that the patent to defendant conveys a better title than the plaintiff's confirmation of older date.
2. The fourth instruction is erroneous, because it assumes that the plaintiff was only entitled to the quantity mentioned in his grant, although the confirmation was for all within his survey—a larger quantity.

In support of these positions, the plaintiff relies on the decision of this Court at its last term in the case of Harold and wife vs. Simonds and Bailey. The cases are precisely parallel.

3. The court also erred in instructing the jury that twenty years possession of any part of the defendant's tract gave him a title against the plaintiff, who had lived on his tract forty years.

4. There was evidence of residence of twenty years of defendant on a part of his tract, but not the part in dispute, while all the evidence shewed that plaintiff had resided on his Spanish grant for forty years.

5. The court erred on the point of estoppel.

#### CAMPBELL, for Defendant, insists:

1. The plaintiff has not exhibited any sufficient title upon which he ought to recover the land in controversy, even if the defendant had nothing but a naked possession.

2. The highest and most complete evidence of title to land emanating from the United States is a patent describing the land; but when no patent has been issued, other documents may form good evidence of title. Thus, a certificate of confirmation according to survey, and a copy of survey conforming to the confirmation, may be good *prima facie* evidence of title; but when the copy of survey produced does not conform to the survey mentioned in the certificate of confirmation, it furnishes no evidence of title to the land thus described.

3. Where grants were made by the Spanish Government for a specific quantity of land, and that quantity is confirmed by the United States, it is competent for the United States to have it surveyed, in order to distinguish the land thus confirmed from the public land; and in making such survey, if the survey made by the Spanish authorities should be found to contain a larger quantity of land than called for in the grant, it is competent for the United States to have the surplus thrown off, and the survey reduced so as to conform to the true quantity granted.

4. Even if it be conceded that a grantee may claim more land than the quantity of acres named in his confirmation, when the confirmation is made according to survey, and that the United States have no right to curtail the survey and cut off surplus, yet, in order to enable a grantee to hold more than the quantity of land mentioned in his grant, he should be able to establish his survey

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satisfactorily by well known boundaries, corners and land-marks, either natural or artificial, so as to show satisfactorily that the land claimed by him is the same identical land mentioned in his grant and survey.

5. The survey made by Palmer, the county surveyor, in connection with the other evidence in the cause, does not afford any satisfactory evidence that the land in controversy and now sought to be recovered by the plaintiff is included within the original Spanish survey alluded to in his confirmation.

6. The Circuit Court erred in permitting the plaintiff to introduce as evidence the plat of survey certified by the Surveyor General, because, although of the same date, it does not appear by any evidence to be the same survey mentioned in plaintiff's certificate of confirmation, which is there described to be a survey recorded in a particular book and page in the office of recorder of land titles; and the very fact of the plaintiff having failed to procure a certificate of that survey from the office of the recorder of land titles, affords *prima facie* evidence that if produced, it proved to be adverse to his claim, and that it would conflict with the survey from the Surveyor General's office, which he has procured, but which is not referred to in the confirmation; and as the plaintiff has produced no other paper to prove the identity of the land claimed in the declaration with the land mentioned in his confirmation, he must entirely fail if that survey from the Surveyor General's office be either excluded or adjudged insufficient.

7. The survey of Palmer, the county surveyor, having been founded on the certificate and plat of survey from the Surveyor General's office, which is not referred to in the confirmation, does not afford any legal evidence that the land surveyed by him is the same land that was confirmed to Cottle.

8. The survey made by Palmer, and on which the plaintiff relies, does not conform to, and is not supported by, the Spanish plat and survey from the Surveyor General's office, according to which he testifies he made it, because it does not call for any corner or mark mentioned in said Spanish plat and survey by which it could be identified, and because the north and south lines of the survey called for in the original Spanish plat are only fourteen arpens long, whereas those lines are twelve poles longer in the survey made by Palmer, and are so made by said Palmer without any lawful authority or good reason for so doing. The Spanish survey, as certified from the Surveyor General's office, calls for a tract twenty-five arpens long by fourteen arpens broad, which would make exactly 350 arpens the quantity granted to said Cottle and surveyed to him by the United States; but the survey made by Palmer is much wider, and by reason of that unlawful extension of width, is made to embrace about one hundred acres more than the true quantity.

9. If the evidence in the cause shews that the plaintiff did not make out a complete title on which he ought to recover, or if on his entire evidence there were sufficient reasons to prevent his recovery, then this cause should not be reversed, even if the court should consider some of the instructions given by the Circuit Court to be incorrect; for if the court can see from the whole record that substantial justice has been done in the matter, they will not disturb the judgment of the Circuit Court because it may have given an erroneous instruction, which should not have altered the result even if it had been decided correctly. Where the record shows a judgment for the right party, it should stand.

10. The plaintiff, Andrew Cottle, was estopped by his deed to Simon Creech, and his deed to Thomas Sydnor, from contending that the western line of his survey is further west than the western lines of the two tracts of land thus sold, and consequently from contending that the premises now in controversy are situated within his survey.

11. The evidence in the cause proves that twenty years before the commencement of this suit, John Waggoner, claiming under Jesse Perkins, was in actual possession of the north-east quarter of section two, in township forty-eight north, of range one west, which includes the premises in controversy; that he claimed to own the whole of that quarter section as his own; inhabited, improved and cultivated it; and that he and Thomas Bowen and John Sydnor, the defendant, have

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ever since had peaceable adverse possession of the same, and that consequently the claim of the plaintiff is barred by the statute of limitations, if he ever had one.

12. The original purchase of the quarter section of land above referred to was probably made by Jesse Perkins as early as the year 1818, although owing to delays of the land office, the patent did not issue till the 23rd December, 1826.

13. The title of the defendant, by patent from the United States to Jesse Perkins, and a complete chain of title by deeds from Jesse Perkins to the defendant, constitutes a better title to the land than the plaintiff's title. 1 Mo. R., page 777.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of ejectment instituted by Cottle in the Circuit Court of Lincoln county, to recover possession of a small tract of land alleged to be within the limits of a Spanish survey. The original concession was made by Lieutenant Governor Delassus on the 20th September, 1799, and was surveyed by James McKay on the 23rd December, 1803, and certified by him on the 20th January, 1804. The claim before the board of commissioners was for 350 arpens, situate on the waters of the river Cuivre, in the district of St. Charles. In July, 1803, the board granted the said claimant 350 arpens, situate as aforesaid, provided so much be found vacant there. In September, 1810, the board confirmed to Andrew Cottle three hundred and fifty arpens as described in the plat of survey certified 20th January, 1804. In 1816 or 1817, the lands in this part of the country were surveyed and sectionized by the United States surveyors, and in 1819 or '20, they were brought into market.—In making these surveys, the United States surveyors cut off from Cottle's tract, as it was originally surveyed by McKay, a strip on the west side about six chains in width, and containing altogether near one hundred acres, leaving in the tract, however, still upwards of 350 arpens.—The controversy is in relation to the southern corner of this strip, containing about fourteen acres, upon which are located the dwelling houses and other improvements of the defendant.

The plaintiff, for the purpose of establishing his title, introduced the confirmation of 1806 and of 1810, the survey by McKay in 1803, and a survey by the county surveyor founded upon the original Spanish survey, together with the oral testimony of this county surveyor and the chain carriers, to establish the correctness of the survey and its conformity to the original Spanish survey.

The defendant relied on a patent from the United States for a quarter section, in which the tract in controversy is included, to Jesse Perkins, assignee of James McWilliams, issued in 1826, and a derivative title



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from said Perkins to himself. He also relied on an adverse possession of more than twenty years in himself and those from whom he purchased. He also relied on two deeds made by the plaintiff, the one to Thomas Sydnor, executed in 1837, and the other to Simon Creech in 1828. In these deeds, the plaintiff, in conveying portions of his Spanish grant, as surveyed by the United States, recognized the corners of his tract as they had been designated in the United States survey. In relation to the testimony concerning an adverse possession, there was some diversity among the witnesses as to the precise locality of Waggoner's improvements in 1819 or 1820, but there was evidence to show that Waggoner, from whom the defendant derived title, claimed the whole quarter section, upon a part of which he had made improvements. This quarter section included the land in controversy. The plaintiff had been in possession of his Spanish claim for forty years. We do not give the details of the evidence, since the only question we are called upon to decide arises out of the instructions, and sufficient has been stated to show their applicability to the questions of fact submitted to the jury. The instructions given on the trial were as follows:

1. In this case, the plaintiff, if he recover at all, must recover on the strength of his own title, and not on the weakness of the defendant's title.

2. If the jury believe from the evidence that Palmer, the county surveyor, in making the plat and survey of the tract of land granted to Andrew Cottle and given in evidence in this cause, did not find any corner tree, corner stone, line tree or mark, or bearing tree mentioned or described in the Spanish survey, according to which it purports to have been made, and that said surveyor only found the beginning corner of his said survey by finding the intersection of two old lines which were shown to him by Cottle, the plaintiff, and that he only knew them to be lines of said survey from the information derived from said Cottle, that under such circumstances, said survey made by said Palmer does not furnish any legal evidence that the land contained within said survey is the land confirmed to said Andrew Cottle.

3. If the jury believe from the evidence that the premises in controversy are part of the land granted by the patent to Jesse Perkins, which has been given in evidence in this cause, and that said defendant, Sydnor, holds by regular chain of title to the same under said Perkins, that then the jury must find for the defendant.

4. If the jury believe from the evidence that the tract of land granted to said Andrew Cottle was surveyed by authority of the United States,

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*Cottle vs. Sydnor.*

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in such manner as to give him three hundred and fifty arpens, the quantity named in his original grant, and that the adjacent surplus land on the west not included in said survey thus made was surveyed in the year 1816 or 1817, and sold as public land of the United States, that the premises in controversy were a part of said surplus land thus surveyed and sold, that a patent in due form was issued by the United States in favor of Jesse Perkins for the quarter section including said premises, and that the defendant holds title by a regular chain of conveyances from said Perkins, in that case the jury must find a verdict for the defendant.

5. If the jury believe from the evidence that for the period of twenty years next preceding the time of the commencement of this suit, John W. Sydnor, the defendant, and the persons under whom he claims title, had the actual possession of a part of the quarter section in which the premises in controversy are situated, claiming the whole of said quarter section as their own, and during said twenty years exercised acts of ownership on said quarter section, then they must find a verdict for the defendant.

6. If the jury believe from the evidence that for the period of twenty years next preceding the time of the commencement of this suit, John W. Sydnor, the defendant, and the persons under whom he claims title, had the actual continued possession of a part of the premises in controversy, and cultivated the same as their own, and claiming the whole quarter section in which the same are situated, then they must find for the defendant.

7. If the jury believe from the evidence that Andrew Cottle, the plaintiff, on the 13th day of April, A. D. 1837, by a deed executed to Thomas Sydnor, under the seal of said Cottle, declared the north-west corner of the tract of land thereby sold by him to Thomas Sydnor to be the north-west corner of the Spanish grant on which he, the said Cottle, then resided, and that said deed was duly recorded in Lincoln county on the 19th day of April, A. D. 1837, then said Cottle is estopped in law from contending in this action that the north-west corner of said Spanish grant is at a different place from that mentioned in said deed to Thomas Sydnor.

8. If the jury believe from the evidence that on the 27th day of December, in the year 1828, said Andrew Cottle executed a deed to Simon Creech, under the seal of him, the said Cottle, and in said deed declared that the south-west corner of the land thereby sold to said Creech was the south-west corner of the land of said Cottle, and the north-west corner of said land sold to said Creech was in the west line of the tract

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of land of said Cottle, and that said deed was duly recorded in Lincoln county on the 30th day of December, A. D. 1828, then said Cottle is estopped from contending in this action that the south-western corner of his said Spanish grant and the western line of his said grant are in places different from those mentioned in said deed to Creech.

9. The document given in evidence by the plaintiff, and called a copy of a Spanish survey of Andrew Cottle's grant, does not purport to be a copy of a Spanish survey, and is not certified to be such, there is no legal evidence before the jury that it is a copy of a Spanish survey, and therefore does not furnish any legal evidence to prove where Andrew Cottle's land is situated.

10. If the survey made by Palmer, the county surveyor, as given in evidence by plaintiff in this cause, was based upon the document given in evidence by plaintiff and called a copy of a Spanish survey, and not upon a regular and correct copy of the Spanish survey of said grant, then the survey made by said Palmer is no legal evidence to prove where the land of said Cottle is actually situated.

The third and fourth instructions assume that the patent, which issued in 1826, must prevail over the confirmation in 1810, and are therefore erroneous. *Harrold and wife vs. Bailey*, 9 Mo. R., 326.

Nor do we concur with the position of the Circuit Court that the descriptions of the tracts conveyed by the deeds to Creech and Thomas Sydnor, and the verbal declarations of Cottle, estopped him from claiming the true lines of his survey. We know of no principle which would authorize a stranger to avail himself of a mistake of this kind, or that would permit him to derive a benefit from an act done by the plaintiff under a misapprehension of his rights. So far as Creech and Thomas Sydnor are concerned, Cottle would not be allowed to deny what he has stated in his deeds relative to the corners of his tract. But the defendant in error is no party or privy to those conveyances. In *Jackson vs. Woodruff*, (1 Cow., 276) A owned a patent and B an adjoining patent, and in the location under their respective patents, A, by mistake, curtailed his location on the side of B, in consequence of which, B claimed up to A's location, and deeded a supposed gore between the patents. It was held that A was not concluded by giving conveyances of his land according to such mistaken location. The estoppel extended no farther than to benefit those to whom the conveyances had been made.

The question of adverse possession, upon which the court gave instructions, was not placed before the jury in a proper shape. It is true, as a general principle, that where a party enters a tract of land, claiming

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*Sanders vs. Rains, et al.*

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the whole under a paper title, the possession is adverse as to the whole tract. But where the actual owner is in possession of a part of his tract, he has legal and constructive possession of the whole, and a disseizin can only be effected by an actual ouster. The legal seizin as to the unoccupied portion of the tract follows the legal title, and the *pedis possessio* alone creates an adverse title. Here the plaintiff, it seems, had been in possession of a portion of his Spanish claim for forty years, and this possession of part gave him constructive possession of the whole tract.—The only adverse possession which could give title under these circumstances would be an actual occupancy. His ignorance of the true location of his lines could not affect his title. *Hall and others vs. Powell*, 4 Serg. & R., 465; *Barr vs. Gratz's heirs*, 4 Whea., 223; *Ridgeley's lessee vs. Ogle*, 4 Har. & McH., 129; *Hord vs. Bodley*, 5 Litt., 88; *Gray vs. Moffitt*, 2 Bibb, 508; *Green vs. Siter*, 8 Cranch, 229.

Judgment reversed and cause remanded.

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SANDERS vs. RAINS, ET AL.

A summons issued by a justice of the peace, and made returnable in a time less than that allowed by law, is void. A judgment by default rendered on the service of such summons, is also void, and a party acquires no title under a sale on an execution under such judgment.

### ERROR to Polk Circuit Court.

OTTER & HENDRICK, for Plaintiff, insist:

1. The testimony offered by the plaintiff and rejected by the court ought to have been given to the jury; because it was necessary for the plaintiff, in order to sustain this suit against the defendants, to prove that there was an execution in the hands of the sheriff, under and by virtue of which the property in question was sold;—that there was a judgment of a justice of the peace, and a transcript thereof filed with the clerk to authorize the clerk to issue the execution—and that there was an execution issued by the justice and returned by the constable, no property found, previous to the issuing of the execution by the clerk.

2. It was the best evidence the case admitted of, and the only competent evidence to prove the facts.

3. That the judgment of the justice was a valid judgment, being rendered in a case wherein the justice had jurisdiction over the subject matter of the parties.

*Sanders vs. Rains, et al.*

4. That there was no such errors or irregularities in the proceedings of the justice as rendered the judgment void; but the irregularity, if any, would at most only render the judgment erroneous.

5. That the sale of the sheriff by virtue of the execution which issued on said judgment is good in favor of the purchaser, although the judgment might be erroneous.

6. The defendant, Lawrence Rains, having had notice of the pendency of the suit before the justice of the peace against him in favor of Jones & Co., might have taken advantage of the errors of the justice then; or after the rendition of the judgment, might have taken steps to reverse, set aside or vacate it, immediately. Having failed to do so, and standing by and suffering his property to be sold to satisfy said judgment, he cannot now set up, collaterally as a defence to this suit against the plaintiff, who purchased the property in good faith, the errors of the justice.

The plaintiff refers to the following authorities: Voorhees vs. Bank U. S., 10 Peter's Rep., p. 449; Blair vs. Carter, 4 Cranch, p. 328 and 333; Wheaton vs. Sexton, 4 Wheaton, p. 106; Talbot vs. Thompson, 2 Peter's R., p. 163 and 168; Elliott vs. Fursee, 1 Peter's R., 247-2.

NAPTON, J., *delivered the opinion of the Court.*

Sanders brought an action of ejectment against the defendants in error to recover possession of a tract of land in Polk county. On the trial, he offered in evidence to show title a deed from the sheriff of the county, formally executed and acknowledged, reciting two judgments against Rains before a justice of the peace, with the executions and returns thereon, and the subsequent issuance of executions from the office of the clerk of the circuit court upon transcripts of these judgments properly filed in that office, and a levy and sale under these executions. The plaintiff also offered in evidence the execution and the transcript of one of these judgments before the justice. This testimony, it seems from the bill of exceptions, was offered *en masse*, and objections being made, the execution and transcript were excluded, upon what grounds the bill of exceptions does not show. The transcript from the justice's docket stated that in a suit by Caleb Jones & Co. vs. Lawrence Rains, on a promissory note, drawn payable to plaintiffs, for \$32 05, due one day after date, dated December 25th, 1841, with ten per cent. interest from date, a summons was issued on the 4th April, 1842, returnable the 9th inst.; that constable returned the summons endorsed "served by reading to defendant on the 4th April, 1842." Thereupon, the defendant not appearing, it is considered that judgment be rendered against the defendant by default for \$36 16, debt and interest, &c.

The plaintiff took a nonsuit in consequence of the rejection of his testimony, and afterwards made an unsuccessful motion to have it set aside.

Where objections are made to the introduction of deeds or records, the objections should be stated specifically. In this case, the Circuit Court excluded all the plaintiff's title papers—the sheriff's deeds—the executions and the transcript,—but whether objections were made to all



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*Sanders vs. Rains, et al.*

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these papers, or only one of them—whether their authenticity was denied, or their relevancy and competency questioned, is not shown by the bill of exceptions. It is more convenient in all cases that the bill of exceptions should clearly point out the precise points decided. In this case, we shall pass by this imperfection in the bill of exceptions, both because it is apparent that the case turned upon the transcript of the justice's judgment, and because our opinion upon that point will lead to the same conclusion as a decision upon the other.

¶ The statute which establishes justices' courts and prescribes their powers and duties, requires the process by which defendants are to be notified of a suit to summons the defendant to appear at a time specified, *not less than six days* from the date of the writ. The summons issued by the justice against Rains, as appears from the transcript of the justice, was dated on the 4th and made returnable on the 9th of the month. It was therefore erroneous. Whether this error shall make the writ a nullity, is the only question involved in this case.

There is no doubt that a most decided inclination has been manifested by courts of justice to sustain the validity of judicial proceedings whenever they are questioned collaterally. Where titles have been acquired under judgments, or where the conduct of the officers concerned in the administration of justice has been called in question, great liberality has been evinced in order to sustain such judgments and to protect such officers. There are, however, limits which no court has ventured to overstep. Whilst a just and liberal protection should be extended to the officers of the law in the execution of their duties, and the rights of purchasers be favorably received, the rights of suitors must not be wholly overlooked. Where there is original or acquired jurisdiction in the course of the proceedings, the general rule is, that all errors must be corrected by the same court or by some superior tribunal, and the validity of the judgment will not be permitted to be questioned in a collateral way. *Voorhees vs. Bank U. S.*, 10 Peters, 449. But it is equally reasonable, and just as well settled by repeated adjudications, that where there is no jurisdiction, the judgment is a nullity, and may be disputed collaterally or directly. (Whether the officer who executes a writ founded on such judgment would be responsible or not, depends upon another principle, which it is not now material to consider. The officer looks to his writ, and if a want of jurisdiction does not appear on its face, he is not liable. *Saracool vs. Boughton*, 5 Wend., 170; *Warner vs. Shed*, 10 J. R., 238; *Beach vs. Forman*, 9 J. R., 229.) But if a court of limited jurisdiction issues a process which is illegal and not merely erroneous, or

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*Sanders vs. Rains, et al.*

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if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before it in the manner required by law, the proceedings are void; and in this case of a limited or special jurisdiction, the magistrate attempting to enforce the proceeding founded on any judgment, sentence or conviction in such a cause, becomes a trespasser. (Spencer, J., in *Bigelow vs. Starns*, 19 J. R., 41.) At all events, whether the magistrate be held responsible or not, (of which Judge Spencer appears to entertain no doubt in the case just cited) it is clear, that no title can be based on such a judgment. Where there is no process or appearance, or where the process used is unknown to the law, or one which the particular tribunal could in no case use, the judgment is void and may be questioned collaterally. *Beach vs. Abbott*, 6 Ver. R., 586; *Grummon vs. Raymond*, 1 Conn. R., 54; *Allen vs. Gray*, 11 Conn. R., 102. A process unknown to the law, or prohibited by the law, makes the case no better than where there is an absence of all process and appearance. It has been decided in New York, that where a justice makes an execution returnable in sixty days, where the law requires it to be returnable in ninety days, it is void. *Toof vs. Bentley*, 5 Wend., 276; 9 Wend., 368.

When we speak of void judgments, in contradistinction from voidable ones, it will be understood, that by the former, we mean such judgments whose validity may be questioned in a collateral way, and by the latter, such judgments as are valid until reversed. The term "*void*" is perhaps too strong to apply to any formal judgment, for there is no judgment, if it be in the form of a judgment, but may be reversed upon writ of error, whether the error be such as would permit its validity to be questioned collaterally or only such as could be taken advantage of in a direct proceeding. Neither class of judgments is, therefore, strictly speaking, void. They are not such *nullities* as would prevent a writ from being sued out to have them formally pronounced void. This distinction is practically unimportant and seldom noticed, and I only allude to it now to prevent misapprehension.

As the transcript from the docket of the justice shows that there was no appearance of the defendant in the action brought by Jones & Co. against him, the court could only have acquired jurisdiction on his person by the service of legal process. Had the defendant appeared, there is no doubt that such appearance would have given the court jurisdiction over his person, whether there was any writ or not. Here there was no appearance, the judgment was by default, and the only way jurisdiction could have been obtained, was by the service of the summons. If the

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writ be such that the defendant is under no obligation to obey it, the case stands no better than if there was no writ and no service. Was the defendant bound to notice a writ which summoned him to appear before the justice in four days, when the law expressly declares that such writs shall always allow the defendant *at least* six days? The defendant is presumed to know his rights, and to be acquainted with the statute law of the State. May he not, then, disregard a writ which he knows to be illegal, without incurring any risk or forfeiting any rights? The same principle which authorized a court to hold a writ of execution void because it was made returnable in sixty instead of ninety days, must apply with much greater force to a summons. If the writ be illegal, and not merely erroneous—if the process be one not recognized by the law, and one which the magistrate had no authority to issue—then it appears upon the face of this transcript, that there was no jurisdiction over the defendant—that he had received no legal notice of the proceedings, and that he did not appear. The judgment resulting from such proceedings could not constitute the foundation of a title.

There is no hardship in this doctrine. The purchaser at a sheriff's or constable's sale looks to the judgment, the levy and the sale. He does not concern himself about the regularity of the proceedings, except so far as to see that there is a valid judgment, and for this purpose the face of the record will show whether the court had jurisdiction or not. If there is no valid judgment, he can of course acquire no title under the sale. This much is due to the rights of suitors, to see that the court acquired jurisdiction.

Judge McBride concurring, the judgment is affirmed.

Scott, J., dissenting.

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JOHN G. SHELTON vs. CHURCH'S ADM'RS. &C.

A contract for the conveyance of so much of any land the obligor might own, will not be enforced in equity. A specific performance will only be decreed where a specific thing is agreed to be conveyed.

*John G. Shelton vs. Church's adm'rs, &c.*

APPEAL from Clark Circuit Court.

HICKMAN & WELLS, for Appellant, insist:

1. That the bill has equity.
2. That the covenant is one of which the court can and ought to decree specific performance.
3. That the damages being liquidated, is no obstacle to specific performance—those damages having been relinquished.
4. That the administrators are the proper representatives to perform the covenant, under the direction of the court.
5. That the court erred in dismissing the bill.

SCOTT, J., delivered the opinion of the Court.

This is a bill for a specific performance of the following contract, entered into by Francis Church, during his lifetime, with John G. Shelton, the complainant:

“This indenture, made this twenty-eighth day of January, in the year eighteen hundred and forty-one, between Francis Church of Clark county, Missouri, and John G. Shelton, of the county of St. Louis, Missouri, witnesseth: That whereas the said Church has, by his deed of even date herewith, conveyed unto the said Shelton three hundred and twenty acres of land in the county of Clark, Missouri, and described in said deed, in consideration of three thousand two hundred dollars, which deed Julia Church, the wife of said Francis, has not executed—now, the said Francis Church, in consideration of the premises and of the above mentioned purchase money paid by said Shelton to said Church, does hereby covenant and agree, for himself, his heirs, executors and administrators, with the said Shelton, his representatives and assigns, that Julia, the wife of said Church, shall duly execute and acknowledge said deed in such manner as to convey her dower and all her interest in said premises at any time at the request of said Shelton; that the above lands are worth, at their fair market value, the above sum of thirty-two hundred dollars; that I will indemnify and save harmless the said Shelton, his representatives or assigns, against any loss he may sustain on account of said lands not being worth the said sum of thirty-two hundred dollars, at any time within five years of the date hereof; that if, at any time within five years from the date hereof, the said Shelton shall give me or my representatives six months notice in writing, that he, his representatives or assigns, are dissatisfied with the above referred to lands, I will, and my representatives

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*John G. Shelton vs. Church's adm'rs, &c.*

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shall, convey to said Shelton, his representatives or assigns, by a good and sufficient warranty deed, free and clear from all incumbrances, out of any lands belonging to me or my estate, at a valuation to be fixed by three disinterested men to be selected by said Church and Shelton or their representatives, a quantity sufficient to amount to the above sum of thirty-two hundred dollars; and that if the said Church or his representatives shall fail to keep and perform or shall break any of the above mentioned covenants, he or they so being in fault, will pay to the said Shelton, his representatives or assigns, the sum of four thousand five hundred dollars liquidated damages.

In testimony whereof, the said parties have hereunto set their hands and seals, on this twenty-eighth day of January, in the year eighteen hundred and forty-one.

(Signed) FRANCIS CHURCH, [L. S.]  
JOHN G. SHELTON. [L. S.]

Signed, sealed and delivered in presence of  
*John S. England and John M. Johnson."*

The bill states that Church died seized of much land. A demurrer to the bill was sustained.

A bill for a specific performance is an application to sound discretion. Such is the universal language of courts of equity on applications of this kind. A specific performance of a contract is not a matter *ex debitate justitiae*. (A specific performance of a contract of sale is not a matter of course, but rests in the discretion of a chancellor, under a view of all the circumstances. A court of equity must be satisfied that a claim for a specific performance is fair in all its parts, certain, and is for an adequate consideration and capable of being performed, before it will grant such relief. If a court of equity refuses to interfere, it inflicts no injury on the party, for no decision is made which affects his right to proceed at law for the damages to which he may be entitled. The dismissal of the bill only debars him from relief in equity. 2 Story's Equity, 54; Seymour vs. Delancy, 6 John. C., 220.

The case made out by the bill is not one for specific performance. The distinction is between a contract for a thing in *specie* and one in *kind*.—Where a party contracts to deliver a specific and determinate thing, the plaintiff thereby acquires an interest in the thing itself—an interest a court of equity will protect by enforcing a specific performance. Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law



*John G. Shelton vs. Church's adm'rs, &c.*

may not in the particular case afford a complete remedy. Thus, a court of equity decrees a performance of a contract for land, not because of the real nature of land, but because damages at law may not be a complete remedy to the purchaser, to whom a specific tract of land may have a peculiar and special value. Judge Story says, "that courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property to a far greater extent than in cases respecting personal property, not indeed upon the ground of any distinction founded upon the mere nature of the property as real or personal, but, at the same time, not wholly excluding the consideration of such distinction. In regard to contracts respecting personal estate, it is generally true that no peculiar value is attached to any one thing over another of the same kind; a compensation in damages meets the full merits, as well as the full objects of the contract. If a man contract for the purchase of a hundred bales of cotton or boxes of sugar, or bags of coffee, of a particular description or quality, if the contract is not specifically performed, he may generally, with a sum equal to the market price, purchase other goods of the same kind of a like description and quality, and thus completely obtain his object and indemnify himself against loss. But in contracts respecting a specific messuage or parcel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, peculiar soil or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser, and it cannot be replaced by other land of the same precise value or having the same precise local conveniences or accommodations, and therefore a compensation in damages would not be adequate relief."

From this view of the law governing the specific performance of contracts, it follows that the reasons which induce courts of equity to grant relief of this kind, are not applicable to the present case. No covenant was made to convey any specific tract of land, but any land which might be owned by the deceased five years from the date of the covenant, of such value as would make the lands formerly sold equal in value to \$3200. Damages, in this case, would answer all the purposes of a specific performance.

The specific performance of a contract being a matter resting in the sound discretion of a court of chancery, there is nothing in this agreement at all adapted to conciliate the regard of chancellors.

That a man should purchase a tract of land at a given sum, and take a covenant that if within five years he is dissatisfied with his purchase, he should have other lands to make his purchase equal to its former value,

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*Adams vs. Childers, adm'r, &c.*

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is a little strange! Its novelty is not accounted for in the bill. Such contracts should be left to their remedy at law.

The other Judges concurring, the decree will be affirmed.

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ADAMS VS. CHILDERS, ADM'R., &C.

A person having hired a slave for a year, hires it to another, who, by his cruelty, causes the death of the slave, the owner or original hirer may maintain an action for the recovery of the value of the slave thus killed.

### ERROR to Clark Circuit Court.

ANDERSON, DRYDEN & WELLS, *for Plaintiff in error, insist:*

1. That defendant, Adams, was not liable to the plaintiff, Childers, as administrator of Moss, for the loss of the negro.
2. The breach does not correspond to the promise as laid in the declaration, the promise being "to take reasonable care of the negro during the year." The breach is, that "the negro died in consequence of mistreatment."

GLOVER & CAMPBELL, *for Defendant in error, insist:*

1. That the evidence supports the verdict as to the cruel treatment of defendant and death of the slave.
2. The third count is well pleaded and covers the case made by the evidence. 2 Kent's Com., 587. If the thing hired be lost or damaged by the hirer or by his servants acting under him, he is responsible, and a bailee is a servant. 2 Tuck., 87. Moss, therefore, was responsible to Wooden's estate for the value of the slave, if misused by him or any one claiming under him; he was therefore entitled to his action for the full value under the circumstances. See Story on Bail's. 268, 361, 388, 390-1; 2 Starkie's Ev., 44; 1 Chitty's Pl., 71; 1 T. R., 112; 1 H. B., 82; see 2 Tuck., 87. There is no doubt the plaintiff here could have recovered the value of the slave by action on the case; much more ought he when he declares upon a contract.
3. The killing of the slave was a breach of the promise to take reasonable care of her during the year, and gave a right of action immediately. 1 Chit. Pl., 367. Where it is said the breach must be assigned according to the sense and substance of the contract. Litt. Sel. Cases, 414; 1 Pirt., 213; 4 Litt., 161; 1 Pirt., 215; Wheeler on Slavery, 155; 1 Chitty Pl., 371; 2 Stark R., 311; 6 Litt., 416.
4. It was not competent for the defendant to undertake to show under the general issue that plaintiff was not administrator of Moss, though the court required plaintiff to introduce evidence on that point.

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*Adams vs. Childers, adm'r, &c.*

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SCOTT, J., *delivered the opinion of the Court.*

Moss, the intestate of the defendant in error, hired a negro girl of Dedrick Hunor, for the year 1844; afterwards, during that year, Moss died, and his administrator, the defendant in error, hired out the girl for the remainder of the year to the plaintiff in error, who, by his ill treatment and inhumanity, caused the death of the girl. The declaration was on the implied contract to take reasonable care of the slave. There was a judgment against Adams for the value of the slave, from which he has sued out this writ of error.

The only question raised in the case on the agreement was the right of Moss's administrator to maintain this action.

There is an implied obligation on every hirer to restore the thing hired when the bailment is determined. Story on Bailment, sec. 414.

The obligation of Moss to return the slave to Hunor, from whom he hired her, was a sufficient interest in the slave to enable him to sustain this action. It is a general rule, that every person who is answerable to another for property in his possession, has such special property in the chattel as enables him to maintain an action of trespass for the taking or injuring thereof by a stranger. Bacon, tit. Trespass, 564. So it seems it is a liability which gives a bailee a right of action.

It is well settled law, that either the person in whom the general property is, or the person in whom there is a special property, may maintain an action for an injury to or destruction of property bailed, and recover damages to the full value of the property injured or destroyed; and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other. Bacon, tit. Tres., 566; Story on Bailment, sec. 94. So the tenant in possession may recover the full value of a chattel, and after deducting the value of his interest in it, will hold the balance as trustee for him in reversion. Ingersoll vs. Van Bokkelen, 7 Cow., 681; Lyle vs. Barker, 5 Bin., 457.

Judge McBRIDE concurring, the judgment will be affirmed.

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*The State, to use, &c., vs. McLernan, et al.*

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THE STATE, TO USE, &C., vs. McLERNAN, ET AL.

A constable for failing to return an execution is liable to the penalty of 100 per cent. per annum until the money is paid.

APPEAL from Benton Circuit Court.

HENDRICK, for Appellant.

SCOTT, J., delivered the opinion of the Court.

This was an action of debt on a constable's bond. The breach of the condition of the bond alleged in the declaration was a failure to return an execution. The execution was returned, it seems, after the return day, but before the commencement of the suit; at least it was so found by the jury. The only question in the case was whether, in assessing the damages, the jury should allow the interest of one hundred per cent. per annum given by the statute after the return of the execution and up to the commencement of the action.

There is nothing in the statute which fixes the period up to which the interest shall be calculated. The interest of one hundred per cent. per annum, it would seem, was designed as an indemnity to the plaintiff for the time during which he was deprived of the use of his money, as well as a penalty on the officer. The law does not oblige the officer to seek the plaintiff to pay him his money. He is only required to have it ready to be paid over to those entitled to it; or the execution, with a reason why he has not made the money, on the day of the return of the writ at the office of the justice. It is the plaintiff's duty to be there to receive it, and the law presumes he will be. If the officer fails to make return at the proper time, he then is in default, and can only free himself from further liability by going to the plaintiff and tendering the money due, with the penalty thereon up to the time of tender. His neglect to do this, will subject him to the penalty until the money is paid.

The other Judges concurring, the judgment will be reversed and the cause remanded.

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*Ellis vs. Whitlock.*

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## ELLIS vs. WHITLOCK.

1. An action of debt will lie for the recovery of the penalties imposed by the first section of the act to prevent certain trespasses. The word "section," as used in the third section, should be read "sections."
2. This is not to be regarded as a penal statute—it merely gives the injured party an increase of damages.
3. The rule which requires penal statutes to be construed strictly, merely restrains such construction as would increase the penalty.

## ERROR to Clinton Circuit Court.

*LEONARD, for Plaintiff in error, insists :*

That debt lies for the penalty given in the first section of the act concerning trespasses. Statute 1845; Commonwealth vs. Loring, 8 Pick., 370; Ex-parte Brown, 21st Wend., 316.

*HICKMAN & WELLS, for Defendant in error, insist :*

1. That the action of debt will not lie at common law for a trespass, such as the one complained of in this case. On this point there can be no doubt.
2. That the third section does not give the remedy for any thing but the penalties mentioned in the second section—not for the damages in the first or second section.
3. The declaration is not brought for the trespasses mentioned in the act.

*SCOTT, J., delivered the opinion of the Court.*

This was an action of *debt*, commenced in January, 1847, by the plaintiff in error against the defendant in error, under the first section of the act entitled "An act to prevent certain trespasses," approved 10th February, 1845. There was a demurrer to the declaration, which being sustained, the plaintiff sued out a writ of error.

The first section of the above recited act gives treble damages for injuries to trees or for injuring or carrying away stones, ore, gravel, &c., or for cutting down or carrying away grass, grain, &c., or for breaking glass in a house. The second section of the said act imposes a penalty of \$5, and double the amount of damages a party may sustain in consequence of another's voluntarily throwing down or opening any doors, bars, gates, &c. The third section of the act prescribes that all penal-



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*Ellis vs. Whitlock.*

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ties contained in the *preceding section* may be recovered by action of trespass or debt founded on this statute by indictment.

The objection of the defendant to the declaration is, that it is in debt, and not in trespass. That the third section of the act using the words *preceding section*, the remedies given by it are only intended for the recovery of the penalty contained in the second section, and do not extend to those contained in the first section, but that the party is left to the remedy at common law for them.

The first legislation on this subject was by the act of 30th of January, 1817, entitled "An act for the prevention of certain trespasses." By that act, the trespasses enumerated in the first and second sections of the act of 1845 were all embraced in one section, and the action of debt was given for their recovery. In the revision of 1825, this act was preserved in the form in which it was originally enacted. The plan adopted in the revision of 1835 was to subdivide sections when they embraced several subjects; and under that system, what had been previously contained in the first section of this act was spread out into two in the manner it stands under the law now in force, which has been shown above. The third section of the act of 1835, which is, as has been observed, in the form the law at present assumes, and under which this action was brought, expressly refers to the *preceding section*, and gives the action of debt as well for the trespasses enumerated in the first as in the second section. This summary of the history of the revision of the statute under consideration is sufficient to show that the Legislature intended no change in the remedies for the recovery of the damages given by the act concerning trespasses. That the addition remedy of an action of trespass was given by the act of 1835, in no wise weakens the argument.

It would seem strange that the Legislature should denounce penalties against trespasses of a like nature, and should give a double remedy for those of the least aggravated character, leaving those of a more violent cast to a single remedy. There is nothing in reason for attributing such conduct to the General Assembly. The argument is not affected by the circumstance that the second section of the act gave, in addition to the double damages, a penalty of five dollars. We think, therefore, that we are well warranted in reading the word "section" "sections," as in the case of *Frazier & Dellenger vs. Gibson*, 7 Mo. R., 271; the word "judgment" in a statute was held to mean "assignment."

The third section of the act gives the action of debt for the recovery of the penalties of the preceding section, when but one penalty is given by that section, so that we have to depart from the letter of the statute

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*Arnett & Brown vs. Dodson.*

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at least to make it effectual. If this can be done in one instance, why not in another? But it may well be argued that the third section using the word *penalties*, when by the preceding section only one penalty had been given, it must have been intended to embrace the penalties of the first section.

The rule which requires penal statutes to be construed strictly, is not applicable here, for it is a principle that when a party is entitled to an action at common law, and an act of the Legislature comes and gives him an increase of damages, that is not to be taken as a penal statute. *Phillips vs. Smith*, 1 Strange, 137; *Cro. Jac.*, 413. Moreover, it would seem that the operation of this rule merely restrains such a construction as increases the severity of the penalty.

The other Judges concurring, the judgment will be reversed and the cause remanded.

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ARNETT & BROWN vs. DODSON.

To authorise a complainant to examine one of several defendants in chancery, if an answer has been filed by him and a replication filed, the replication must be withdrawn, and an affidavit of the want of interest of such party made.

E. L. EDWARDS, *for Appellants.*

YOUNG, HICKMAN & WELLS, *for Appellees.*

SCOTT, J., *delivered the opinion of the Court.*

This was a bill in chancery filed by Dodson the appellee, against Arnett & Brown the appellants, and Jas. G. Cook and Timothy Whitehead. The bill in substance states, that Arnett and Brown contracted with Joel Crittenden, U. States agent for the Osage Indians, to build by the first of July, 1845, for the Chiefs and head men of that tribe, twenty-one houses, on a plan agreed upon, for the sum of \$2100. That on the 17th Feb. of the same year, the said James G. Cook and Timothy Whitehead contracted with Arnett and Brown, to build 8 of the 21 houses for \$600, upon the plan and by the time agreed upon between Arnett & Brown and

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*Arnett & Brown vs. Dodson.*

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the agent. That it was agreed between A. & B. and C. & W. that they A. & B. would give to C. & W. after the completion of the houses, an order on the agent for the sum of \$600, the price of the work agreed to be done. That A. & B. falsely represented to C. & W. that plank and lumber could be conveniently obtained at the place of erecting the said buildings. That in consequence of the difficulty in procuring materials, the houses were not completed at the stipulated time; nor were those to be built by A. & B. That although the contract was forfeited, yet time was given by the agent to A. & B. to finish the houses, who extended the same to C. & W. That about the 21st of April, 1845, Cook & W. contracted with the agent to perform additional work on the houses they had undertaken to build, at and for the sum of \$330, to be paid when the houses were finished. That the complainant furnished C. & W. with provisions and other things necessary for carrying on said work, to the amount of \$90. That on the 15th July, the complainant going out to C. & W. about said sum of money, and finding that he could not get it, expressed his fears to A. & B. about its ever being paid, they proposed to him to go and make arrangements with C. & W. to assist them in doing the work, and to procure from them an assignment of the contract, and that they, A. & B. would then pay him the sum of money C. & W. were to receive from them under the contract. That on the 19th July, in consideration of their indebtedness to him, and also in consideration that he would assist them in the performance of their undertaking, C. & W. assigned to him both of their contracts, as well that with A. & B. as that with the agent. That in conjunction with C. & W. he immediately commenced work and was rapidly progressing, when the first of December, A. & B. fraudulently combining to defraud him, and C. & W. inform the agent that they had, or were about to abandon their work, and would never complete it. That the agent confiding in said misrepresentations, employed the said A. & B. to complete the said houses, who on the 4th December took forcible possession of their tools, and would not let them proceed with their work, but completed it themselves. That the greater part of the work had been done, and it would have been completed in as little time, as it was done by A. & B. had there been no interference by them. That \$200 would have completed the houses when A. & B. commenced the work. That in addition to the sum of \$90 above mentioned, he has spent in provisions, &c., \$303, none of which has been repaid him. That the amount expended by him for the hire of hands was \$547, of which sum \$540 have been paid by him, and he is liable for the balance, C. & W. being insolvent. That A. & B. have

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received the sum stipulated for building the houses. That they refused to give the order on the agent for the \$600; and have only paid to the complainant the sum of \$57 50, and nothing at all to C. & W. The prayer of the bill is, that A. & B. may be compelled to pay the complainant as well the sum of \$600, as the sum of \$330 which was agreed to be paid for the additional work which was to be done.

The answer of Brown one of the defendants admits the agreements stated in the bill relative to the business, by the agent, and the several parties. It denies that there was any verbal agreement respecting an order to be drawn on the agent for six hundred dollars. It denies that any representation was made concerning the facility with which plank and lumber might be procured at the place where the houses were to be built. It states that C. & W. made no exertions to perform their contract with him and Arnett, and on the 21st April, 1845, made an entirely different contract with the agent, respecting the eight houses which they were to build. That this last contract requiring much more labor than the first, they were opposed to C. & W. undertaking it. That although the houses undertaken by him and Arnett were not completed on the day agreed upon, yet they were finished in the month of July. All fraud is fully denied. It is denied that the agent employed him and Arnett to complete the work undertaken by C. & W., and afterwards by the complainant; that the agent having by the contract of the 21st of April, with C. & W. reserved to himself the right to employ others in the event of their failure to do the work within the time stipulated, and C. & W. having totally failed to comply with their engagement, and the agent about the 15th October contracted with him, Brown, alone, to finish the contract of C. & W., he being allowed a reasonable price for his services and materials. That about the 1st of December, he and complainant had some difficulty about the work, the complainant still working after he had undertaken the contract. That they went to the agent about the matter, when the complainant was directed by the agent to desist from the work, as he had employed him, Brown to complete it, as he was, by his contract with C. & W. authorised to do. That the agent told complainant that Brown should have a reasonable compensation for his services, and the balance of the \$930 should be paid to him. That the complainant consented to the arrangement, and wrote a letter to his hands, which was delivered, directing them to cease work on his account. That Arnett was no party to the contract the respondent made with the agent, that he was at home, and it was not until he had undertaken the work, that Arnett was employed by him to assist therein.—

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That no more work was done or charged for by him, than was undertaken by C. & W. by their contract with the agent of the 21st April.— That the work specified in that contract to be done was worth \$1500, and that when he commenced on the buildings they were not more than half finished. Respondent denies that he and Arnett took forcible possession of complainant's tools. That respondent does not believe that the work would have been finished by complainant in a reasonable time. That C. & W. had sometime before he was employed, abandoned the work altogether. That after he had finished the work, he made out his account for the same, that the agent, complainant and he, met together, and settled the same, that when any item of the account was disputed, it was by the agent referred to arbitrators, and their award as to the propriety and reasonableness of the charge adopted in the settlement.— That upon an adjustment thus made, there remained to the complainant, of the sum of \$930, a balance of \$147, \$85 of which was retained by the agent for depredations of the complainant's servants, on the Indians, and the rest paid over to him.

Arnett's answer, so far as it goes, does not vary from that of Brown's. Cook also filed an answer, which it is not material to notice. To these several answers, replications were filed. Most of the allegations of Brown's answer, relative to the conduct of the agent in this transaction, were supported by his deposition, which was taken in the cause. The evidence of the witnesses in no material matter contradicted the answer, except so far as to their opinion of the sum necessary to complete the houses, and as to the time at which the work was begun by C. & W. Cook, one of the defendants, was made a witness by the complainant, who testified as follows:—"About the 18th day of July, 1845, I and Timothy Whitehead transferred the bonds that we held, the one on Arnett & Brown, for six hundred dollars, and the other on the United States given by agent to Dodson. Dodson and Arnett had conversation together the same evening, and Brown and Dodson conversed together next morning. Brown told me that Dodson wanted to see what I and Whitehead owed him, Dodson, and said if we would transfer the bonds to Dodson, he, Dodson, was willing to go on and finish the work. I told Dodson and Brown, that there was money coming out of the six hundred dollar bond for glass, &c., about eighty dollars to Arnett & Brown, and that there was something coming for the hands; Dodson said he could settle what was coming to the hands, with them, the hands. There was a three hundred and thirty dollar bond given by the agent as above mentioned, and I also transferred that to Dodson. Brown then told Dodson to go on



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with the work, and he should have his money; we then came in to Van Buren county. Dodson then wanted me to go out and work for him. I started about the 21st August, but was taken sick—many of the hands were taken sick. I started the second time and was again taken sick. Arnett wanted me to go out after they got the contract from Dodson.—The agent said he taken the contract from Dodson and given it to Brown. Arnett told me he was a partner with Brown. I told Arnett that perhaps Brown would not let him, Arnett, into the contract which had been taken from Dodson. Arnett replied that Brown would be glad to see him, Arnett, coming with hands and provisions. While Arnett and I were going out to the work, Arnett told me that Brown came to him, before the contract had been taken from Dodson by the agent, and said, "Let us go and throw Dodson out of the ring, and finish the work and draw the money." Arnett said he told Brown that he did not want to have any thing to do with it while Dodson was at work, but when Dodson was out, then he, Arnett, was in. Well, said Brown, will you stand up to me, if I throw Dodson out?—and Arnett said he told him yes, Brown I always have stood up to you, and I will do it again. Brown then said he would go out and throw him, Dodson, out. Arnett also told me in some conversation, that he had written out a letter to his son Wesley Arnett, which letter was carried out by Brown before the work was taken from Dodson, in which letter Arnett said to witness, he had stated to his son to hold on a little longer with the work, that we have the hatchet in our own hands, and we intend to use it, and he would be on with some hands and provisions. After Dodson got the work, the agent said he would give 'till the 1st of October to finish, and afterwards I told the agent we could not get the work done then, and he said, that so the work was going on it was all he wanted. The agent said you can get it done by the first of December, and all the Indians want is to have it go on. Before we took the contract for the additional work, I went to Arnett about it, and Arnett said he had no objection, but to go on. I went to the agency with Arnett, and told him that if he had any objection to my going into the contract of the 21st of April, I would drop it, Arnett said no,—go on: I will give as much time as the agent will. This was not to affect the contract with Brown & Arnett, and when I afterwards told Arnett that I could not get the work done in time, Arnett replied that he would give as much time as the agent would. The consideration of the assignment of the bonds, was the debt, Whitehead and I were owing Dodson. Dodson at the time said bonds were assigned to him, said that he would pay for what work I had done or might do, he also said it

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would be profitable and to go ahead with the work, and he would give me money to enter a quarter section of land. I am not liable to Dodson on the amount of said bonds, and I have no interest in the event of this suit. Brown advised me to assign the bonds to Dodson, but Arnett never said anything to me about it. Witness met Arnett & Brown on the return from the agency after they had got the money for the work done, and he asked the which got the money, to which they replied laughingly, that Dodson had got all the money.

There was a difference of opinion among the witnesses, as to the amount of money necessary to complete the houses when Brown took the contract. One thought \$150, and another \$275 would be sufficient. It appeared that the anxiety of Brown & Arnett to have the work completed, proceeded from the fact that they could not get the money for the houses they had built, until the eight undertaken by C. & W. were completed.

The bill was dismissed as to C. & W., and a decree for six hundred dollars was entered against Arnett & Brown, from which they appealed.

As to the testimony of Cook, it may be observed that proper course to have been pursued in order to have obtained it, was to have withdrawn the replication to his answer, and have made a motion for his examination founded on an affidavit of his want of interest. He would then have been examined, subject to all just exceptions. The rule at law is rigid that a plaintiff cannot examine a defendant, but in equity this is relaxed, and in the mode just stated a plaintiff in chancery may have the benefit of the testimony of a defendant. Greenleaf, sec. 361. We do not see that Cook had any interest in this suit, but if he had, no objection was made to his examination in the court below.

We see nothing in the testimony of Cook to affect the determination of this cause. His evidence shows some anxiety on the part of A. & B. to have the contract of C. & W. completed, but considered in connexion with the fact that A. & B. could not obtain payment for the houses which they had built and which had been completed for a considerable time, until those undertaken by C. & W. were finished, it is not at all surprising. The houses, or a portion of them had been built by sub-contractors and the inconvenience of a deferred payment it is obvious must have been great.

After an attentive consideration of this case and the agreements of the solicitors in support of the decree, we cannot perceive any principle on which it can be sustained. We do not see on what ground the complainant is entitled to relief against the defendants A. & B. either in law or

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equity. The agent is the source of all the hardship and oppression in this transaction, and if he has injured the complainant, that is no reason why he should be redressed at the cost of the defendants. If Brown did urge the agent to take the contract from the complainant, that does not shift the responsibility from the agent on him. The agent had a right by the contract to employ another to do the work; whether that right was reasonably exercised or not, is a question not to be discussed in this cause and between these parties. If the complainant has been injured by the conduct of the agent, let him sue him. After the agent had interfered in the contract between A. & B. and C. & W. by stipulating for additional and more expensive work from the latter party without the consent of the former, we do not see the justice of his withholding payment from A. & B. for their work, until the contract for the additional work was completed. But for this act on his part it appears that this controversy would never have arisen.

But what is conclusive, as it seems in this case, is, that the complainant, though at first he was unwilling that Brown should take the contract, yet, finally yielded his opposition. Brown's services were to be performed on a *quantum meruit*. He was present at the settlement of Brown's account. Charges objected to by him, were arbitrated; the judgment of the arbitrators was adopted in all matters of dispute. This bill does not seek to impeach or set aside this settlement, it is not to surcharge and falsify Brown's account, but on some vague and undefined idea seeks redress from those who it appears have not injured him.

The other Judges concurring, the decree will be reversed.



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